No. 99-1823-CFX Title: Equal Employment Opportunity Commission, Petitioner
v.
Waffle House, Inc.

Docketed: May 16, 2000 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Mar 31 2000	Application (99A809) to extend the time to file a petition for a writ of certiorari from April 13, 2000 to May 13, 2000, submitted to The Chief Justice.
	Apr 4 2000	Application (99A809) granted by the Chief Justice extending the time to file until May 15, 2000.
	May 15 2000	Petition for writ of certiorari filed. (Response due July 17, 2000)
	May 24 2000	Order extending time to file response to petition until July 17, 2000.
	Jul 17 2000	Brief of respondent Waffle House, Inc. in opposition filed.
	Aug 2 2000	DISTRIBUTED for Conference of September 25, 2000
	Aug 8 2000	Reply brief of petitioner Equal Employment Opportunity Commission filed.
	Mar 21 2001	REDISTRIBUTED for Conference of March 23, 2001
	Mar 26 2001	Petition GRANTED. SET FOR ARGUMENT October 10, 2001. **********
	May 1 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 25, 2001.
	May 25 2001	Brief of petitioner Equal Employment Opportunity Commission filed.
	May 25 2001	Joint appendix filed.
	May 25 2001	Brief amicus curiae of Maryland Commission on Human Relations, et al. filed.
	May 25 2001	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	May 25 2001	Brief amicus curiae of AFL-CIO filed.
	May 25 2001	Brief amicus curiae of AARP filed.
	May 25 2001	Brief amici curiae of Missouri,et al. filed.
	May 25 2001	Brief amicus curiae of National Whistleblower Center filed.
	May 25 2001	Brief amici curiae of National Employment Lawyers Association, et al. filed.
	Jun 20 2001	Order extending time to file respondent's brief on the merits to and including July 12, 2001.
	Jul 12 2001	Brief of respondent Waffle House, Inc. filed.
	Jul 12 2001	Brief amicus curiae of Employment Law Equity filed.
	Jul 12 2001	Brief amicus curiae of Equal Employment Advisory Council filed.
	Jul 12 2001	Brief amicus curiae of Associated Industries of Massachusetts, et al. filed.
	Jul 12 2001	Record filed.
	Jul 20 2001	CIRCULATED.
	Jul 26 2001	Record filed.
	Aug 15 2001	Reply brief of petitioner Equal Employment Opportunity Commission filed.

No. 99-1823-CFX

Entry	Date	Proceedings and Orders
	Aug 31 2001	Letter from counsel for amici National Employment Lawyers Association, et al., received and DISTRIBUTED.
	Oct 10 2001	ARGUED.

Supreme Court, U.S.
FILED
991823 MAY 15 2000

No.

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee's agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission, as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as backpay, reinstatement, and damages.

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

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In the Supreme Court of the United States

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 193 F.3d 805. The opinions of the district court (App., *infra*, 30a-34a) and of the magistrate judge (App., *infra*, 37a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1999. A petition for rehearing was denied on January 14, 2000 (App., *infra*, 35a-36a). On April 4, 2000, the Chief Justice extended the time within which

to file a petition for a writ of certiorari to and including May 15, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans With Disabilities Act of 1990, the Civil Rights Act of 1964, and the Federal Arbitration Act are reproduced in the Appendix, *infra*, 54a-63a.

STATEMENT

Based on a claim filed with the Equal Employment Opportunity Commission (EEOC) by Eric Scott Baker, the EEOC brought this action against respondent in United States District Court for the District of South Carolina, alleging that respondent had engaged in unlawful employment practices against Baker on the basis of disability. Respondent moved to compel arbitration or to dismiss the action under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, on the ground that Baker had agreed to arbitrate employment-related disputes. The district court denied the motion, finding that Baker and respondent had not entered into an agreement to arbitrate. The court of appeals affirmed the district court's refusal to compel arbitration, concluding (contrary to the view of the district court) that Baker and respondent had agreed to arbitration, but that that agreement did not prevent the EEOC from bringing this public enforcement action. The court also held, however, that, although the EEOC could obtain general injunctive relief, the agreement between Baker and respondent did preclude the EEOC from obtaining other, victim-specific forms of relief, such as backpay, reinstatement, and compensatory and punitive damages. The court of appeals accordingly instructed the

district court to dismiss the claims for those forms of relief.

1. As originally enacted, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253, authorized only a private right of action against employers. See generally *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980). The EEOC was given the authority to process charges of discrimination and, if possible, to work out conciliation agreements with employers, but it was not authorized to bring suit against an offending employer. *Ibid.* In 1972, Congress amended Title VII to provide the Commission with independent authority to bring suit in court. See 42 U.S.C. 2000e-5(f)(1).

The effect of the 1972 amendment was to create a dual system of private and public enforcement. Before a suit can be brought, a charge must be filed with the EEOC by or on behalf of an aggrieved person or by a Member of the EEOC. The EEOC must investigate the charge. 42 U.S.C. 2000e-5(b). If the EEOC finds reasonable cause to believe that discrimination has occurred, it must attempt to conciliate the charge; if that effort is unsuccessful, the EEOC may choose to bring a public enforcement action in its own name. 42 U.S.C. 2000e-5(b) and 2000e-5(f)(1). An employee may intervene in such a suit, but the employee may not bring a suit in the employee's own name if the EEOC has elected to file its own action. 42 U.S.C. 2000e-5(f)(1). If the EEOC fails to act within certain designated time periods or determines that it will not itself file a suit and so notifies the employee, the employee may bring a private suit under Title VII. 42 U.S.C. 2000e-5(f)(1). The EEOC may intervene in any such action. 42 U.S.C. 2000e-5(f)(1). Whether the action is brought by the EEOC or by an employee, the relief

available includes injunctive relief, as well as backpay, reinstatement, and other equitable relief. 42 U.S.C. 2000e-5(g)(1). See *General Tel.*, 446 U.S. at 324. In 1991, Congress expanded the relief available to "a complaining party" in such an action—defined to include both private plaintiffs and the EEOC, see 42 U.S.C. 1981a(d)(1)(A)—to include limited compensatory and punitive damages. See 42 U.S.C. 1981a(a)(1).

Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, outlaws discrimination in employment on the basis of disability. Title I expressly incorporates "[t]he powers, remedies, and procedures set forth in [Title VII]." 42 U.S.C. 12117(a). That includes the procedures outlined above applicable to enforcement actions brought by the Commission and the equitable relief available under 42 U.S.C. 2000e-5(g). In 1991, at the same time as it enacted 42 U.S.C. 1981a(a)(1), which made damages available to a "complaining party" in a Title VII suit, Congress enacted 42 U.S.C. 1981a(a)(2), which in identical terms made the same forms of damages available to a "complaining party" in an ADA suit. The term "complaining party" was defined for ADA purposes—as for Title VII purposes—to include both private plaintiffs and the EEOC. 42 U.S.C. 1981a(d)(1)(B).

2. This case involves a public enforcement action brought by the EEOC. On June 23, 1994, Eric Scott Baker applied for employment at a Waffle House facility in Columbia, South Carolina. App., *infra*, 2a. The application included a provision stating

> that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions, or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration.

App., *infra*, 18a n.2. Baker was not hired to work at that facility, however. Instead, he began work on August 10, 1994, at a nearby Waffle House facility in West Columbia, South Carolina, apparently without filling out another job application. *Id.* at 3a.[1]

Baker had a seizure disorder. On August 26, 1994, he had a seizure that lasted approximately 30 seconds just after arriving for work. He went home for the day,

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[1] The facts recited in text are undisputed. There is some dispute about the relationship between Baker's June 23 application for the job at the Columbia facility and his ultimate employment six weeks later at the West Columbia facility. The record contains the following information on that subject:

The EEOC filed a set of standard interrogatories with the complaint in this case, based on the EEOC's initial investigation of this case, reciting that "[t]he Manager [of the Columbia Waffle House] interviewed Baker and hired him to work in another nearby Waffle House * * * in West Columbia." C.A. App. 13. Respondent filed an affidavit from its general counsel stating that "[a]ll prospective Waffle House employees are required to complete and sign a Waffle House employment application prior to being hired," *id.* at 24, and attaching the application completed by Baker at the Columbia Waffle House on June 23, 1994. *Id.* at 26-27.

After respondent moved to compel arbitration, EEOC filed an affidavit by Baker giving a somewhat different account of events. The affidavit stated that "[t]he manager [of the Columbia Waffle House] hired me; however, I subsequently declined the job offer." C.A. App. 29. The affidavit then explained that "[a] few weeks after the job offer, I spoke with [the] manager of another nearby Waffle House * * * in West Columbia, South Carolina, and [the manager there] offered me a job * * *, which I accepted." *Ibid.*

On the basis of this information, the district court concluded that the arbitration clause in the application for the job in Columbia did not govern the job in West Columbia (App., *infra*, 34a); the court of appeals reached the opposite conclusion (*id.* at 5a-7a).

and the manager of the West Columbia facility told him not to report for work because of his disorder. On September 5, 1994, respondent terminated Baker's employment. App., *infra*, 32a.

3. Baker filed a charge with the EEOC, complaining that his discharge violated the ADA. He did not submit a claim for arbitration. On September 9, 1996, the EEOC filed this enforcement action in its own name against respondent, alleging that respondent had engaged in "unlawful employment practices on the basis of disability" and seeking "appropriate relief to Eric Scott Baker, who was adversely affected by such practices." C.A. App. 7. The EEOC sought an injunction barring respondent from employment discrimination on the basis of disability, an order that respondent institute antidiscrimination polices and practices to create opportunities and eradicate the effects of past and present disability discrimination, backpay and reinstatement for Baker, compensation for pecuniary and non-pecuniary losses suffered by Baker, and punitive damages. App., *infra*, 4a.

In response, respondent filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to compel arbitration and to stay or dismiss the EEOC's enforcement action. The matter was referred to a magistrate judge, who filed a report concluding that Baker had entered into an arbitration agreement with respondent covering the instant claim. The magistrate judge recommended that the motion to dismiss the EEOC's action be denied, but that the motion to compel arbitration be granted and the proceedings in this case be stayed pending arbitration. App., *infra*, 4a-5a, 33a.

The district court disagreed with the magistrate judge's conclusions. Apparently relying on Baker's affidavit, see note 1, *supra*, the court held that "it does

not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate." App., *infra*, 34a. Because there had been no agreement to arbitrate, the court ruled that the motion to dismiss and the motion to compel arbitration should be denied. *Ibid.*

4. Respondent filed an interlocutory appeal pursuant to 9 U.S.C. 16(a)(1). A divided panel of the court of appeals reversed the district court's finding that there had been no agreement to arbitrate, holding that such an agreement had been reached between Baker and respondent. The court noted that there was a conflict in the circuits regarding "whether and to what extent the [EEOC], in prosecuting a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer." App., *infra*, 1a-2a (citing *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998), and *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999)). Addressing that question, the court followed the Second Circuit's decision in *Kidder, Peabody* and held that, although the agreement did not preclude an enforcement action by the EEOC because the EEOC was not a party to the agreement, it did limit the relief available in an EEOC enforcement action. See App., *infra*, 15a.

a. With respect to whether an agreement had been formed, the court relied on the interrogatories filed by the EEOC with the complaint in this case, App., *infra*, 3a; see also note 1, *supra*, and held that "[t]he generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him." App., *infra*, 7a. Accordingly,

the court concluded that "Baker's application, when accepted by Waffle House, did form a binding arbitration agreement between Baker and Waffle House." *Ibid.*

The court then addressed the question of what effect, if any, the agreement between Baker and respondent had on EEOC's enforcement action. App., *infra*, 7a-18a. The court recognized that "[i]n enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to 'advance the public interest in preventing and remedying employment discrimination.'" *Id.* at 8a (quoting *General Tel.*, 446 U.S. at 331). Referring to the 1972 amendments to Title VII that had vested the EEOC with power to bring enforcement actions in its own name, the court noted that "it was clear that Congress intended by these Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." App., *infra*, 8a. The court explained that Congress intended "to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact." *Id.* at 9a-10a.

The court reached two conclusions. First, the court concluded that respondent "cannot succeed on its motion to compel the EEOC to arbitrate." App., *infra*, 13a. That conclusion was based on the court's recognition "that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate," *id.* at 12a, that "the EEOC is not a party to any arbitration agreement," *ibid.*, and that "the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest," *ibid.*—an argument that

"disregards the EEOC's independent statutory role," *ibid.* The court also noted that this Court had "recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements." *Id.* at 13a (citing *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

Second, the court concluded that the charging party's agreement to arbitrate precludes the EEOC from obtaining victim-specific relief—such as backpay, reinstatement, or damages—in an enforcement action. The court noted the federal policy "to give [an arbitration] contract effect in order to favor the arbitration mechanism for dispute resolution." App., *infra*, 14a. In the court's view, "[t]o permit the EEOC to prosecute in court Baker's individual claim * * * would significantly trample this strong policy favoring arbitration." *Ibid.* The court stated that, "[b]ecause Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself." *Ibid.* The court concluded that "[t]he EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, but * * * it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims." *Ibid.*

As applied to this case, the court thus held that the EEOC may seek to enjoin respondent from engaging in discriminatory actions and the EEOC may seek an order directing respondent to carry out practices and programs to provide equal employment opportunity and eradicate the effects of past and present discrimination. App., *infra*, 15a-16a. But the court held that the

EEOC "cannot pursue Baker's individual remedies in court," such as "backpay, reinstatement, and compensatory and punitive damages." *Id.* at 17a. Because the EEOC had stated that it had no intention to pursue those remedies in arbitration, the court "d[id] not reach the question of whether the EEOC is authorized to do so." *Ibid.* The court remanded the case "with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted on behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief." *Id.* at 17a-18a. The court did not reach the question "whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks." *Id.* at 18a n.3.

b. Judge King dissented on the ground that Baker and respondent had not entered into an arbitration agreement. He stated that "the district court concluded that Mr. Baker and Waffle House had not made an agreement to arbitrate with respect to the job that [Baker] ultimately accepted—the position of grill operator at the West Columbia Waffle House." App., *infra*, 21a. In his view, that conclusion was based on findings of fact that were not clearly erroneous, *id.* at 22a, and it was supported by the applicable principles of South Carolina contract law, *id.* at 23a-24a.[2] Judge King would consequently have affirmed "the district court's order denying Waffle House's motions to dismiss and compel arbitration, thereby enabling the

[2] We continue to believe, as we argued to the court of appeals, that Judge King's conclusion was correct, and that there was no agreement to arbitrate in this case. Further review of that issue, however, is not warranted, since it concerns the specific facts of this case and issues of state law. Therefore, we assume, for purposes of this petition, that Baker and Waffle House entered into a valid agreement to arbitrate employment-related disputes.

EEOC to pursue injunctive and 'make-whole' relief on behalf of Mr. Baker." *Id.* at 22a.[3] Judge King did not reach the question whether, if there had been a valid arbitration agreement between Baker and respondent, it would have had any effect on this EEOC enforcement action.

5. The court of appeals denied EEOC's petition for rehearing en banc by a 7-4 vote.

[3] Judge King's dissent also noted two additional grounds that could render the arbitration agreement unenforceable, but neither was presented to or discussed by the panel majority, and neither is therefore before the Court on this petition. App., *infra*, 26a-27a n.9. First, he referred to the arbitration agreement's provision that "[t]he costs and expenses of the arbitration shall be borne evenly by the parties." *Id.* at 26a n.9. He explained that several circuits have held that such a provision is unenforceable in similar contexts and may render the agreement to arbitrate itself unenforceable. The EEOC did not raise this issue before the panel, however, and the panel majority did not rule on it. Accordingly, the question whether and under what circumstances arbitration agreements containing similar provisions are enforceable as applied to statutory antidiscrimination claims would not be before the Court on review of this case. For that reason, this case need not be held pending this Court's decision in *Green Tree Financial Corp.—Alabama* v. *Randolph*, cert. granted, 120 S. Ct. 1552 (2000) (No. 99-1235), which presents, *inter alia*, the question whether "an arbitration provision that was 'silent' on the issue of costs and fees was unenforceable under the Federal Arbitration Act because the risk that plaintiff 'might' be required to bear unknown costs and fees potentially undermined her ability to vindicate statutory rights." 99-1235 Pet. at i.

Second, Judge King stated that the arbitration provision in the employment application in this case was "so inconspicuous that it failed, as a matter of law, to provide Mr. Baker with sufficient notice that he was waiving his right to a judicial forum for his statutory claims." App., *infra*, 27a n.9. This question was not presented to or passed on by the panel majority, and it is therefore not before the Court on this petition.

REASONS FOR GRANTING THE PETITION

The court of appeals' ruling holds that the EEOC can be deprived of an important enforcement tool that Congress granted it—victim-specific relief—by an arbitration agreement to which the EEOC never became a party or otherwise assented. That ruling is mistaken and threatens serious harm to the EEOC's enforcement role under federal antidiscrimination statutes. Because arbitration agreements of the sort at issue in this case are increasingly common, the issue can be expected to arise frequently in the future. Moreover, as the court of appeals recognized, its decision in this case—as well as a decision of the Second Circuit in a similar setting— conflicts with a decision of the Sixth Circuit holding that an indistinguishable arbitration agreement has no effect on the ability of the EEOC to obtain all of the forms of relief authorized by Congress, including the precise forms of victim-specific relief barred by the Fourth Circuit in this case. As a result of this conflict, the relief available to the EEOC depends on the circuit in which the case arises. The conflict in the circuits is squarely presented by this case, and further review is therefore warranted.

1. The court below held that by entering into an arbitration agreement with the employer, the employee barred not only himself but also the EEOC from seeking statutory remedies for discrimination in the form of reinstatement, backpay, or compensatory or punitive damages. That holding rests on the view that in seeking those victim-specific forms of relief, the EEOC is largely vindicating private rather than public interests (App., *infra*, 15a), and therefore the EEOC should be circumscribed by the contractual choices made by the private party for whom it acts (*id.* at 16a-17a)—in

particular, the choice to arbitrate, which is favored by the federal policy embodied in the FAA (*id.* at 14a.).

The court of appeals' holding on this point ignores this Court's teaching in *General Telephone* that when the EEOC brings an action to enforce the anti-discrimination law, and even when it seeks backpay and other victim-specific relief, it does not act simply as a proxy for the individual victims of discrimination. In *General Telephone*, the Court rejected the claim that EEOC enforcement actions seeking, *inter alia*, backpay for individual victims of discrimination should be considered "representative actions" subject to Federal Rule of Civil Procedure 23. The Court observed that, when Congress amended Title VII in 1972 to authorize the EEOC to bring enforcement actions, it did not eliminate the right of aggrieved individuals to sue in the absence of EEOC action, and it authorized such individuals to intervene in a suit brought by the EEOC. 446 U.S. at 326. The Court explained that "[t]hese private-action rights suggest that the EEOC is not merely a proxy for the victims of discrimination," and that its enforcement actions therefore should not be considered representative actions subject to Rule 23. *Ibid.* The Court stated that even when the EEOC seeks "specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.'" *Ibid.* (quoting 118 Cong. Rec. 4941 (1972)). In short, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Ibid.*

Because the EEOC is not a representative of private parties in litigation, an agreement by a private party to submit disputes to arbitration—or to any other means of resolution—does not commit the EEOC to do the same thing. As the Court recognized in *General Telephone*, Congress granted the EEOC authority independent of a charging party "to bring suit in its own name for the purpose, among others, of securing relief for * * * aggrieved individuals." 446 U.S. at 324. See also *id.* at 324-325 ("straightforward reading of the statute * * * authorize[s] the EEOC to sue in its own name to enforce federal law *by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act*") (emphasis added). A charging party's agreement to resolve its own disputes by submitting all employment-related claims to arbitration cannot alter the EEOC's statutory authority to sue in federal court and obtain any statutorily authorized remedies there.

Indeed, Congress identified the pre-1972 enforcement scheme, which left enforcement to the choices of private individuals, as a "major flaw in the operation of Title VII." *General Tel.*, 446 U.S. at 325 (quoting S. Rep. No. 415, 92d Cong., 1st Sess. 4 (1971)). As this Court has recognized, victim-specific relief serves a public interest (not merely a private one) by providing "the spur or catalyst which causes employers * * * to endeavor to eliminate, so far as possible, [discriminatory practices]." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). By returning substantial control of that important enforcement tool to private parties, the Fourth Circuit's decision substantially reverses Congress's decision to remedy the "major flaw" in Title VII by giving full—indeed, primary—enforcement authority to the EEOC.

2. a. The decision below deepens an existing split in the circuits. In *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (1999), the Sixth Circuit followed *General Telephone* and held that the EEOC may obtain victim-specific relief in federal court, notwithstanding a private arbitration agreement. In *Frank's Nursery*, the defendant employer required all applicants for jobs to sign a pre-employment agreement providing for compulsory arbitration of all employment claims. *Id.* at 452. An employee who had signed such an agreement filed a charge with the EEOC alleging that the employer bypassed her for promotion on the ground of her race. *Id.* at 453. The employee did not attempt to arbitrate the dispute or otherwise privately settle her claim. *Ibid.*

The EEOC investigated the charge and, after attempts at conciliation with the employer failed, filed suit against the employer in federal district court. *Frank's Nursery*, 177 F.3d at 453. The EEOC sought injunctive relief against the employer, an order requiring the employer to carry out equal employment opportunity policies and eradicate the effects of past and present employment discrimination, and, as in the present case, an order requiring the employer "to 'make whole' [the employee] by providing backpay with prejudgment interest, as well as compensatory damages beyond backpay and punitive damages." *Ibid.* The district court dismissed EEOC's complaint, including its claim for monetary relief, because of the existence of the employee's arbitration agreement. *Id.* at 454.

The Sixth Circuit held that "the district court erred in dismissing the EEOC's claim for monetary relief on behalf of [the employee] by relying on * * * the FAA." 177 F.3d at 459. Quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 625-

626 (1985), the court noted that the FAA "as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements." 177 F.3d at 459. Applying "general principles of contract law," the court reasoned that "one individual cannot contractually waive the statutory rights of one who is not a party to the contract, and one individual cannot, by waiving her statutory right to vindicate her own interest, waive the statutory right of a federal sovereign to vindicate the public interest unless the government agrees." *Id.* at 460. Therefore, since the EEOC "never agreed to arbitrate and is not bound by [the employee's] agreement to arbitrate," *id.* at 461, the private arbitration agreement does not "override the broad powers of the EEOC to obtain monetary remedies for violations of Title VII," *id.* at 459.

The court below acknowledged that its decision conflicts with the Sixth Circuit's decision in *Frank's Nursery*. See App., *infra*, 15a. In both cases, an individual signed a pre-employment agreement to arbitrate, a discrimination dispute arose, and the employee did not seek arbitration. In both cases, the employee exercised the statutory right to file a charge with the EEOC, which investigated the claim and ultimately brought suit for, *inter alia*, victim-specific equitable relief and damages. But, while the Sixth Circuit in *Frank's Nursery* held that the private agreement to arbitrate had no effect on the EEOC suit, including its request for victim-specific relief, the Fourth Circuit in this case held that the private agreement to arbitrate precluded the EEOC from seeking such victim-specific relief in federal court.[4]

[4] The Fourth Circuit also relied on decisions in which a charging party litigated or settled that party's own discrimination claims and the EEOC also brought an action based on the same incident. See App., *infra*, 17a (citing *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990)); see also *Merrill Lynch, Pierce, Fenner and Smith, Inc.* v. *Nixon*, No. 99-2635, 2000 WL 433245 (8th Cir. Apr. 24, 2000) (state agency). Those cases are inapposite, because they raise issues of res judicata and mootness not present in this case. Cf. *General Tel.*, 446 U.S. at 333 ("It * * * goes without saying that the courts can and should preclude double recovery by an individual."). In this case, Baker took no action that is inconsistent with his entitlement to the full relief sought by the EEOC in this action. Even if he chose arbitration as the forum in which to obtain such relief, that choice could not bind the EEOC to choose the same forum.

The fact that *Frank's Nursery* arose from a Title VII race discrimination claim, while this case arises from an ADA claim of discrimination on the basis of disability, is of no consequence. Title I of the ADA—the title governing employment discrimination—expressly incorporates "[t]he powers, remedies, and procedures set forth in [Title VII]." 42 U.S.C. 12117(a). Thus, 42 U.S.C. 2000e-5(g), which provides that a district court may order victim-specific equitable relief such as reinstatement and backpay, is applicable both in Title VII actions and in actions under the ADA. Moreover, the pertinent terms in 42 U.S.C. 1981a(a)(1) that authorize damages in Title VII cases are identical to the terms in 42 U.S.C. 1981a(a)(2) that authorize damages in cases brought under Title I of the ADA.

b. The court below chose instead to follow the reasoning of *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (1998), in which the Second Circuit held that a private arbitration contract barred an EEOC action for damages. *Kidder* held that "an arbitration agreement between an employer and employee precludes the EEOC

from seeking purely monetary relief for the employee under the ADEA in federal court," *id.* at 300-301, although "the EEOC may seek injunctive relief in the federal forum for employees even when those employees have entered into binding arbitration agreements," *id.* at 302. The Second Circuit's decision in *Kidder, Peabody* therefore also appears to conflict with the Sixth Circuit's decision in *Frank's Nursery*, although *Kidder, Peabody* arose in the slightly different context of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Under the ADEA's enforcement scheme, unlike the scheme applicable to Title VII and the ADA, an employee has no right even to intervene once the EEOC has initiated an enforcement action in its own name. 29 U.S.C. 626(c)(1). That has led some courts to conclude that the EEOC has "representative responsibilities when it seeks private benefits for an individual." *Kidder, Peabody*, 156 F.3d at 302 (quoting *EEOC* v. *United States Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990))—a conclusion with which we disagree, but which could if accepted lead to a different result in ADEA cases.

3. The question presented in this case can be expected to recur frequently in the future. The EEOC filed 439 suits in fiscal year 1999. See http://www.eeoc.gov/stats/litigation.html (May 12, 2000). In most of those cases, it sought victim-specific relief. Under the Fourth Circuit's ruling in this case (and, arguably, the Second Circuit's decision in *Kidder, Peabody*), such relief is not available in cases filed in the States comprising the Second and Fourth Circuits in the increasingly large number of instances in which predispute arbitration agreements are a condition of employment. See *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 199 n.12 (D.

Mass. 1998) (citing studies showing increase in predispute employment arbitration agreements), aff'd, 170 F.3d 1 (1st Cir. 1999). On the other hand, when the EEOC files a similar case in one of the States comprising the Sixth Circuit, victim-specific relief is available under *Frank's Nursery*. Further review is therefore warranted.

4. There is a potential connection between this case and two petitions for certiorari currently pending on this Court's docket—*Circuit City Stores, Inc.* v. *Adams*, No. 99-1379 (filed Feb. 16, 2000), and *Circuit City Stores, Inc.* v. *Ahmed*, No. 99- 1378 (filed Feb. 16, 2000). Each of those cases presents the question whether contracts of employment such as the one in this case are outside the scope of the Federal Arbitration Act, which contains an exclusion for "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*" 9 U.S.C. 1 (emphasis added). In *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.1 (1991), this Court reserved the question whether that exclusion essentially applies to all contracts of employment. The Ninth Circuit has since held that, as a result of the exclusion, "the FAA does not apply to labor or employment contracts." *Craft* v. *Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999). A number of other courts of appeals, however, have held to the contrary. See *id.* at 1086 n.6 (citing cases); App., *infra*, 41a (same).

The question whether the FAA governs the contract in this case is not squarely presented by this petition. In the district court, the EEOC raised the question whether the exclusion applies to this case. See App., *infra*, 41a. By the time the case reached the Fourth Circuit, however, that court had "limited the section 1

exemption to seamen, railroad workers, and other workers actually involved in the interstate transportation of goods." *O'Neil* v. *Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997). Accordingly, the EEOC did not present this issue to the court of appeals, and the court of appeals did not pass on it. It is therefore not before the Court on this petition.

Nonetheless, if this Court were to grant certiorari in either of the *Circuit City* cases and then to rule that employment contracts like the one in this case are not covered by the FAA, it would substantially affect the analysis of the question presented here. The court of appeals' holding that the EEOC could not seek victim-specific relief in this case was based on "the federal policy embodied in the FAA" to "favor the arbitration mechanism for dispute resolution." App., *infra*, 14a. If the FAA does not cover employment agreements like the one in this case, however, such agreements would generally be subject to state law, which may embody different policies.[5] Cf. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996) (where arbitration agreement is subject to FAA, state laws restricting arbitration agreements inapplicable). In those circumstances, the applicable state law may well favor or disfavor arbitration, or it may restrict the availability of arbitration in certain circumstances. App., *infra*, 46a (citing provisions of South Carolina law applicable specifically to arbitration agreements). Moreover,

[5] In the absence of the FAA, there is no other federal law that would appear to govern arbitration clauses in individual employment contracts. Cf. *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70, 77-78 & n.1 (1998) (noting "presumption of arbitrability" applicable to collective bargaining agreements under 29 U.S.C. 185).

there would be a substantial question whether state laws that require enforcement of arbitration clauses in employment contracts were sufficient to override Congress's provision of a federal judicial forum for those bringing employment-related claims under the federal antidiscrimination laws.

Depending on the resolution of those issues, both the legal analysis of the question presented in this case (which, in the Fourth Circuit's view, turned on the FAA's policy favoring arbitration) and its practical significance (which would be lessened if federal antidiscrimination claims were not subject to arbitration clauses in employment agreements) could be substantially affected. Accordingly, the Court may wish to hold this petition pending disposition of the *Circuit City* cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 98-1502

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INCORPORATED, DEFENDANT-APPELLANT

Argued March 1, 1999
Decided Oct. 6, 1999

Before NIEMEYER and KING, Circuit Judges, and LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Judge LEE joined. Judge KING wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

This appeal presents the question of first impression in this circuit whether and to what extent the Equal Employment Opportunity Commission ("EEOC"), in prosecuting a suit in its own name, is bound by a

private arbitration agreement between the charging party and his employer. Other circuits are split on the proper response to this question. Compare *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (holding that an arbitration agreement between a charging party and an employer precludes the EEOC from seeking purely monetary relief in federal court on behalf of the charging party but not from seeking broad injunctive relief), with *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that a private arbitration agreement does not affect the scope of the EEOC's federal court suit at all).

Recognizing that the EEOC is vested with enforcement authority both to seek broad-based injunctive relief in the public interest and to seek "make-whole" relief on behalf of a charging party, we conclude (1) that the EEOC cannot be compelled, by reason of an arbitration agreement between the charging party and his employer, to arbitrate its claims, but (2) that, to the extent that the EEOC seeks to obtain "make-whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum. Accordingly, we affirm the district court's decision to deny Waffle House's petition to compel arbitration generally and remand to the district court for consideration of the EEOC's claims in light of this opinion.

I

On June 23, 1994, Eric Baker, who was seeking employment, entered the Waffle House facility located at exit 113 of Interstate 26 in Columbia, South Carolina, and proceeded to fill out and sign an application for employment with Waffle House, Inc. He left blank the

space on the application asking what position he sought. The application included a provision requiring the applicant to submit to binding arbitration "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment." Although the manager at that Waffle House facility, Lee Motlow, asked Baker whether he wanted the job there, Baker declined and instead, called the manager of a nearby Waffle House facility located at exit 110 of Interstate 26 in West Columbia, to whom Motlow had referred Baker.[6] The West Columbia Waffle House manager interviewed Baker and hired him to begin work two weeks later. Baker did not fill in another application and began work in the West Columbia facility on August 10, 1994, as a grill operator.

At his home, approximately two weeks later, Baker suffered a seizure, ostensibly caused by a change in the medication he was taking to control a seizure disorder that had developed as a result of a 1992 automobile accident. The next day, just after arriving for work, Baker suffered another seizure. Waffle House discharged Baker on September 5, 1994, stating in the separation notice that "We decided that for [Baker's]

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[6] In its answers to interrogatories, the EEOC stated more particularly: "Shortly after he had spoken with Motlow, Baker called the Manager at the Waffle House to which Motlow had referred him. The Manager interviewed Baker and hired him to work in another nearby Waffle House, Unit # 446 in West Columbia. Baker visited Unit # 446 and spoke with the Manager, Mike Bradley. They agreed that Baker would start two weeks later." J.A. at 13.

benefit and safety and Waffle House it would be best he not work any more."

Baker filed a charge with the EEOC, complaining that his discharge violated the Americans With Disabilities Act of 1990 ("ADA"), and on September 9, 1996, the EEOC filed this enforcement action in its own name against Waffle House pursuant to § 107(a) of the ADA, 42 U.S.C. § 12117(a), and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, alleging that Waffle House had engaged in "unlawful employment practices at its West Columbia, South Carolina, facility." The EEOC stated in its complaint that its purpose for filing the suit was "to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices." It sought as relief (1) a permanent injunction barring Waffle House from engaging in employment practices that discriminate on the basis of disability; (2) an order that Waffle House institute and carry out antidiscrimination policies, practices, and programs to create opportunities and to eradicate the effects of past and present discrimination on the basis of disability; (3) backpay and reinstatement for Baker; (4) compensation for pecuniary and non-pecuniary losses suffered by Baker; and (5) punitive damages.

In response to the complaint, Waffle House filed a petition under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to compel arbitration and to stay the litigation and, alternatively, to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). The motion was referred to a magistrate judge who—relying on the undisputed record consisting of the complaint, answers to interrogatories, and affidavits filed in connection

with the motion to compel arbitration—recommended to the district court that it conclude that Baker had entered into an arbitration agreement with Waffle House and that the EEOC was required to arbitrate the claims it filed on behalf of Baker. The district court, relying on the facts "extrapolated from the pleadings," disagreed with the magistrate judge's recommendations and denied each of Waffle House's motions, concluding that the arbitration provision contained in Baker's employment application was inapplicable because the West Columbia Waffle House facility, which ultimately hired Baker, had not hired him pursuant to his earlier application submitted at the Columbia Waffle House facility.

Waffle House filed this interlocutory appeal challenging the district court's denial of its petition to compel arbitration and to stay proceedings. *See* 9 U.S.C. § 16(a)(1). On appeal, it argues that (1) contrary to the district court's holding, a valid, enforceable arbitration agreement existed between Baker and Waffle House and (2) its motion to compel arbitration under § 4 of the FAA should be granted because the arbitration agreement between Baker and Waffle House binds the EEOC to "assert Baker's claim in an arbitral forum."

II

Because arbitration is a matter of contract, we must first determine whether an enforceable arbitration agreement governed Baker's employment with Waffle House. *See Johnson* v. *Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir. 1998). The district court concluded that the arbitration agreement in Baker's employment application did not govern his employment relationship with Waffle House because it was sub-

mitted to the Waffle House facility at exit 113 of Interstate 26 in Columbia, and Baker was not ultimately employed at that facility. When Baker later went to the Waffle House facility at exit 110 of Interstate 26 in West Columbia, he was given a job there without submitting another application. The court thus concluded, "it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate."

We disagree with the district court's analysis because it assumes that the two Waffle House facilities were legally distinct entities in this context. The employment application Baker completed was the standard form application for employment with the corporation Waffle House, Inc., and not with an individual Waffle House facility. Indeed, the manager at the Columbia Waffle House facility referred Baker to the manager at the West Columbia Waffle House facility. In filling out the application, Baker left blank the space provided on the form for listing specific positions applied for, and he specified no intent to limit the application to a particular location. Moreover, when Baker did begin work at the West Columbia facility, he did not fill out another application. It cannot be assumed that a national corporation like Waffle House hired an individual without gathering any of the requisite information, such as his proper name, address, social security number, age and other personal data, qualifications, and references, all of which were contained in the application Baker originally submitted at the Waffle House facility in Columbia.

Accordingly, the fact that Baker was ultimately employed at a different facility than the one at which he was physically present when he completed the application is immaterial to the applicability of the arbitration agreement. The generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him. We thus conclude that Baker's application, when accepted by Waffle House, did form a binding arbitration agreement between Baker and Waffle House.

Having reached that conclusion, however, we must still determine what effect, if any, the binding arbitration agreement between Baker and Waffle House has on the EEOC, which filed this action in its own name both in the public interest and on behalf of Baker.

III

In its motion to compel arbitration, Waffle House sought "to enforce the arbitration agreement between Waffle House and Baker and compel the EEOC, on behalf of Baker, to submit Baker's employment related dispute with Waffle House to arbitration." On appeal, it continues to maintain that "[i]t is of no consequence under the FAA that the EEOC is bringing this action on behalf of Baker rather than Baker bringing this action directly" because the EEOC is "bound by Baker's arbitration agreement with Waffle House." The EEOC characterizes Waffle House's argument as "an astounding proposition." It argues that not only did it "never agree[ ] to arbitrate its statutory claim," but also that the EEOC "has independent statutory authority to bring suit in any federal district court where venue is proper." We agree with the EEOC.

In enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to "advance the public interest in preventing and remedying employment discrimination." *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980). The EEOC's independent authority to enforce the ADA is clear.

In enacting the ADA, Congress chose to incorporate the enforcement "powers, remedies, and procedures" of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (incorporating by reference 42 U.S.C. §§ 2000e-4, -5, -6, -8, -9). These Title VII mechanisms vest the EEOC with broad authority to enforce, in federal court, the statute's ban on disability-based discrimination. *See* 42 U.S.C. § 2000e-5(f)(1), (f)(3). Under Title VII as originally enacted, the EEOC's powers were limited to investigation and conciliation, and Congress relied exclusively on private parties' suits for enforcement. In 1972, however, seeking to remedy widespread noncompliance under this enforcement system, Congress amended Title VII, according the EEOC the right to file suit in federal court in its own name to eradicate discriminatory employment practices. *See General Tel.*, 446 U.S. at 325-26, 100 S. Ct. 1698. Although the amendments created a dual system of private and government enforcement, we have long recognized that "it was clear that Congress intended by these [1972] Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." *EEOC* v. *General Elec. Co.*, 532 F.2d 359, 373 (4th Cir. 1976) (internal quotation marks and citation omitted).

Because of this public mission, the EEOC cannot be viewed as merely an institutional surrogate for individual victims of discrimination. *See General Tel.*, 446 U.S. at 326, 100 S. Ct. 1698 (holding that "the EEOC's enforcement suits should not be considered representative actions subject to Rule 23"). "[U]nlike the individual charging party, the EEOC [sues] 'to vindicate the public interest' as expressed in the Congressional purpose of eliminating employment discrimination as a national evil rather than for the redress of the strictly private interests of the complaining party." *General Elec.*, 532 F.2d at 373 (quoting *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975)); *see also EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (concluding that because the EEOC's "interests are broader than those of the individuals injured by discrimination . . . private litigants cannot adequately represent the government's interest in enforcing the prohibitions of federal statutes" (citations omitted)); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (observing that "[p]rivate litigation in which the EEOC is not a party cannot preclude the EEOC from maintaining its own action because private litigants are not vested with the authority to represent the EEOC" (citations omitted)); *EEOC* v. *United Parcel Serv.*, 860 F.2d 372 (10th Cir. 1988); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987).

The statutory structure of Title VII's enforcement remedies (and therefore those of the ADA) reflects the notion that the scope of the public interest exceeds that of the individual's interest. In order to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public

impact, a charging party "may not proceed to federal district court until . . . the EEOC has made its own determination as to the validity of complainant's claim and issued a right-to-sue letter." *Davis* v. *North Carolina Dep't of Correction*, 48 F.3d 134, 138 (4th Cir. 1995). And if the EEOC chooses to file suit, the charging party may not bring his own suit; his right is then limited to intervening in the EEOC's suit. *See* 42 U.S.C. § 2000e-5(f)(1). In a similar vein, when a private individual brings suit, the court may, under certain circumstances, permit the EEOC to intervene to protect the national interest. *See id.* In addition, once the EEOC decides to sue in its own name, it is not limited to the facts presented in the charge. Rather, the EEOC may sue based on "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *General Tel.*, 446 U.S. at 331, 100 S.Ct. 1698; *see also General Elec.*, 532 F.2d at 370. Finally, the EEOC's independent interest is also reflected in the fact that a charging party may not withdraw his charge without the consent of the EEOC. *See* 29 C.F.R. § 1601.10.

Even while empowering the EEOC to sue on a charge independently, Congress preserved the individual's private remedies under Title VII, indicating that private suits are still appropriate to redress individuals' grievances. And even when the EEOC has determined to bring suit in its own name, the charging party retains "the right to intervene in a civil action brought by the Commission" if the individual believes that the EEOC will not adequately represent his interests as it pursues its public objectives. *See* 42 U.S.C. § 2000e-5(f)(1); *compare* 29 U.S.C. § 626(c)(1) (terminating an individual's right to sue under the ADEA upon the EEOC's commencement of an action to enforce that individual's rights).[7] Congress anticipated that the EEOC would not always be able to achieve the best possible result for each individual while at the same time pursuing its mission to vindicate the public interest. *See General Tel.*, 446 U.S. at 331, 100 S. Ct. 1698 (noting that the EEOC "is authorized to . . . obtain the most satisfactory overall relief even though competing interests are involved" and that it must make "the hard choices where conflicts of interest exist").

In short, under the 1972 amendments to Title VII, which are incorporated into the ADA, Congress has created a dual enforcement system, reflecting the notion that the EEOC and the charging party are not interchangeable plaintiffs. Each has its own distinct, albeit overlapping, interests for which overlapping remedies are provided. Thus, in pursuing the inquiry into whether the EEOC can be compelled to arbitrate on the basis of an arbitration agreement binding the charging party, we do not take the EEOC as a surrogate for the charging party, subrogated to his interest. Rather, we examine the related, but independent, interests of both the EEOC and the charging party to determine how an arbitration agreement signed by the charging party affects the prosecution of a claim by the EEOC.

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[7] In concluding that this "distinctive enforcement scheme of the ADEA" illustrates the EEOC's "representative responsibilities when it initiates litigation to enforce an employee's rights," the Third Circuit expressly noted that the enforcement scheme of Title VII "from which the framers of the ADEA consciously departed . . . has no similar feature." *U.S. Steel*, 921 F.2d at 494 & n.4.

First, we must recognize that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate. On the contrary, as demonstrated above, the 1972 amendments to Title VII clearly show that Congress intended that the EEOC vindicate the public interest by conciliation and then by suit in federal court. We must also recognize that in this case the EEOC is not a party to any arbitration agreement. *See AT & T Technologies, Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986); *Arrants* v. *Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (explaining that "[e]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate" (citation omitted)). Thus, the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest. This argument, however, disregards the EEOC's independent statutory role as we have outlined it.

In addition, contrary to Waffle House's claims, neither of the other two circuits that have addressed the question of the impact of a private arbitration agreement on the EEOC's ability to sue in its own name have concluded that such an agreement permits a court to force the EEOC into arbitration under the FAA. *See Frank's Nursery*, 177 F.3d at 462 (observing that "courts may not treat the agreement of a private party to arbitrate her action as the agreement of the EEOC to arbitrate its action"); *Kidder, Peabody*, 156 F.3d at 301-02 (upholding the district court's grant of the employer's motion to dismiss the EEOC's ADEA suit seeking solely monetary damages but not addressing the issue of compelling the EEOC to arbitrate because the employer did not seek to do so).

Moreover, the Supreme Court has recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991) (holding that an employee's private arbitration agreement with her employer precluded *her* from filing suit against the employer under the ADEA). Although a private arbitration agreement does bar an individual ADEA claimant from asserting her claim in court, it does *not* prevent her from filing a charge with the EEOC. *See id.* at 28, 111 S. Ct. 1647. This rule demonstrates the Court's recognition that the EEOC's suit can accomplish aims—namely, combating discrimination on a societal level—that an individual's suit is not equipped, nor perhaps intended, to accomplish. The court also emphasized, in refuting the argument that enforcing arbitration agreements would undercut the statutory scheme, that "it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief." *Id.* at 32, 111 S. Ct. 1647. Thus, it is apparent that the Court did not intend that when an individual who is subject to an arbitration agreement files a charge, the EEOC can only pursue relief in an arbitral forum. To the contrary, the Court appears to have contemplated that arbitration agreements between charging parties and their employers would not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws *in court*.

Accordingly, we conclude that Waffle House cannot succeed on its motion to compel the EEOC to arbitrate.

IV

While we have thus observed that the important role of the EEOC in vindicating the public interest in preventing and eradicating workplace discrimination is not to be restricted by arbitration agreements to which it is not a party, its role in vindicating in federal court the individual interests of the charging party implicates the competing federal policy favoring the enforcement of arbitration agreements.

When an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to give that contract effect in order to favor the arbitration mechanism for dispute resolution. *See* 9 U.S.C. § 2; *Moses H. Cone Mem'l. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). To permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong policy favoring arbitration. Because Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself. The EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, *see Gilmer*, 500 U.S. at 28, 111 S. Ct. 1647, but, as we conclude herein, it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims. Although the EEOC acts in the public interest, even when enforcing only the charging party's claim, *cf. Albemarle Paper Co.* v.

Moody, 422 U.S. 405, 417-18, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975), the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief to attack discrimination more generally.

Recognizing these competing policies, we agree with the balance struck by the Second Circuit, which held that although the EEOC "may seek injunctive relief in the federal forum for employees even when those employees have entered into binding arbitration agreements," it may not pursue relief in court—in that case, monetary relief—specific to individuals who have waived their right to a judicial forum by signing an arbitration agreement. *Kidder, Peabody*, 156 F.3d at 302-03; *but see Frank's Nursery*, 177 F.3d at 459-67 (holding that neither the FAA nor principles of preclusion or waiver could operate to bar the EEOC from seeking monetary relief on behalf of aggrieved individuals). When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

Thus, we hold that to the extent that the EEOC seeks "a permanent injunction enjoining [Waffle House] from discharging individuals and engaging in any other employment practice which discriminates on the basis

of disability" and an order to Waffle House "to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices," the EEOC is pursuing the public interest in a discrimination-free workplace, and it must be allowed to do so in federal court, as authorized by the ADA, notwithstanding the charging party's agreement to arbitrate. In seeking to "vindicate rights belonging to the United States as sovereign," *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (internal quotation marks and citation omitted), which are not necessarily identical to the interests of the individual charging party, the EEOC's course of conduct should not be affected by the actions of an individual in entering into a private arbitration agreement. *See* Part III, *supra*. In similar contexts where charging parties have been deprived of their right to sue either by settling their claims or having their claims dismissed, courts have nevertheless permitted the EEOC to maintain a suit for injunctive relief. *See, e.g.*, *EEOC* v. *Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (noting that "there would be little point in [the EEOC] having the independent power to sue if it could not obtain relief beyond that fashioned for the individual claimant"); *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291-92 (7th Cir. 1993); *Goodyear Aerospace*, 813 F.2d at 1542-45.

Conversely, however, in these same contexts some of the same courts have recognized that a charging party's actions that impede his own right to sue *can* also circumscribe the contours of the EEOC's suit in its own name to the extent that it acts on behalf of the charging

party. *See, e.g.*, *Goodyear Aerospace*, 813 F.2d at 1543 (holding that the charging party's acceptance of a personal settlement of her claims rendered moot the EEOC's claims for backpay on her behalf); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (holding that the doctrine of *res judicata* barred the EEOC from seeking "individualized benefits" under the ADEA on behalf of individuals whose own suits were unsuccessful because the EEOC was "in privity" with those individuals); *Harris Chernin*, 10 F.3d at 1291 (following *U.S. Steel's* reasoning with regard to the EEOC's claim for backpay, liquidated damages, and reinstatement for an individual whose suit was dismissed as barred by the statute of limitations).

Similarly, we also hold that when the EEOC enforces the individual rights of Baker by seeking backpay, reinstatement, and compensatory and punitive damages, it must recognize Baker's prior agreement to adjudicate those rights in the arbitral forum. Because the EEOC maintains that it "has no intention" of pursuing a claim in arbitration, we do not reach the question of whether the EEOC is *authorized* to do so. But it cannot pursue Baker's individual remedies in court, although it may seek broad injunctive relief in its public enforcement role.

Accordingly, we affirm the district court's order to the extent that it denied Waffle House's motions to compel the EEOC to arbitrate and to dismiss this action. We reverse its ruling that the EEOC may prosecute Baker's individual claims in court. And we remand with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted on

behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief.[8]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

KING, Circuit Judge, dissenting:

Because I agree with the district court that there was no agreement to arbitrate in this case, I must respectfully dissent. I would, therefore, without reaching the issue of the authority of the EEOC to seek injunctive and "make-whole" relief for Mr. Baker on his ADA claim, simply affirm the decision of the district court.

I.

On June 23, 1994, Mr. Baker completed an employment application at a Waffle House restaurant in Columbia, South Carolina ("Columbia Waffle House" or "CWH").[9] The district court found that the manager of

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[8] Waffle House argues that the EEOC is not entitled to broad injunctive relief because its claim relies exclusively on the incident involving Baker. We leave to the district court the question of whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks. *See* 42 U.S.C. § 2000e-5(g)(1).

[9] The employment application completed by Mr. Baker contains a mandatory arbitration provision, which is comprised of four lines of single-spaced text located at the bottom of the first page of a two-page application. It states in full:

> The parties agree that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

This provision, printed in seven-point font, occupies merely 5/16 of an inch of a page that is eleven inches long. No other clause in the employment application is printed in as small a font size.

the CWH offered Mr. Baker a job on that occasion, which Mr. Baker did not accept.

Approximately three weeks later, Mr. Baker traveled to a different Waffle House restaurant, one located in West Columbia, South Carolina ("West Columbia Waffle House" or "WCWH"), where, the district court found, Mr. Baker "orally applied for a job and was orally given a job which he accepted." J.A. 137. Mr. Baker did not execute a written employment application at the WCWH. Indeed, there is no evidence that the terms of the employment application that Mr. Baker completed at the CWH were discussed or adopted by Mr. Baker and Mike Bradley, the WCWH manager who hired Mr. Baker. Since there was no evidence on the point, the district court found that it did not appear that the "management [of WCWH] knew of or had the benefit of the application form which Baker had previously signed." J.A. 137-38.

The district court made no findings connecting the WCWH offer to the CWH offer that Baker had rejected.[10] Further, the district court's affirmative rejection of the magistrate judge's findings, *see supra* note 2, is, in itself, a factual finding that requires our deference. The district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside [on appeal] unless clearly erroneous." Fed.R.Civ.P. 52(a). Findings of fact may be overturned only if we are "left with the definite and firm conviction that a mistake has been committed." *Anderson* v. *City*

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[10] In its written opinion of March 20, 1998, from which this appeal is taken, the district court found and concluded as follows:

> [T]his Court *sua sponte* inquired concerning the existence of evidence that Baker and Waffle House made an agreement to arbitrate with respect to the job he accepted. The facts stated by the Magistrate Judge which are extrapolated from the pleadings do not suggest that an employment agreement came into being following Baker's signing of the application form on June 23, 1994. Baker left the Columbia Waffle House without accepting employment. It does not appear from the statement of facts relied upon by the Magistrate Judge that when Baker went to the West Columbia, South Carolina Waffle House, the management there knew of or had the benefit of the application form which Baker had previously signed. Instead, it appears that Baker orally applied for and was orally given a job which he accepted. That being the case, it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate. For that reason, I am unable to agree with that portion of the Magistrate Judge's conclusions.

J.A. 137-38. Significantly, the district court expressly rejected the magistrate judge's conclusion that Baker "appear[ed] to have assented to be bound by the prior agreement, that if employed he would submit his claim to arbitration," by Baker's subsequent acceptance of employment at the WCWH.

of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985).[11] The majority wrongly implies that an appellate court may consider and adopt facts found by a magistrate judge—facts already expressly rejected by the district court—without finding such facts to be clearly erroneous.[12]

Based on its factual findings, the district court concluded that Mr. Baker and Waffle House had not made an agreement to arbitrate with respect to the job that he ultimately accepted—the position of grill operator at the West Columbia Waffle House. Consequently, the district court denied Waffle House's motion to compel arbitration and its motion to dismiss.

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[11] *See also* Fed.R.Civ.P. 52 advisory committee's note (1985) (public interest recognizes the trial court, not the appellate tribunal, as the fact-finder, to promote stability and judicial economy). When a court of appeals actively engages in the fact-finding function, it undermines the legitimacy of the district courts. *Id.*

[12] While the majority asserts that the EEOC interrogatory answers support its factual scenario, *see ante* p. [3a] note 1, these answers are legally irrelevant for at least three reasons: (1) they are invalid because they were not made under oath (as required by Rule 33(b) of the Federal Rules of Civil Procedure); (2) they are signed by counsel only (not by Baker, who had the requisite personal knowledge); and (3) their evidentiary value was repudiated by the EEOC at oral argument. *Bracey* v. *Grenoble*, 494 F.2d 566, 570 n. 7 (3rd Cir. 1974). Accordingly, these answers could not and cannot be properly relied on in this case. *See id.* Most importantly, subsequently filed affidavits (properly sworn) do not contain the information relied upon by the majority, *see* J.A. 12, 28, and that information is contrary to the findings of the district court. *See supra* note 2. As I have noted, the majority has not determined the factual findings of the district court to be clearly erroneous.

The district court's findings of fact are not clearly erroneous, and its conclusion that there was no agreement to arbitrate follows perforce from its findings. Accordingly, I would affirm the district court's order denying Waffle House's motions to dismiss and compel arbitration, thereby enabling the EEOC to pursue injunctive and "make-whole" relief on behalf of Mr. Baker.

II.

A.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, which governs here, represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Where there is a valid agreement to arbitrate that covers the matter in dispute, the FAA requires federal courts to stay any ongoing judicial proceedings and compel arbitration. *See Hooters of Am., Inc.* v. *Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (citing the FAA, 9 U.S.C. §§ 3, 4).

But the mandate and policy concerns of the FAA come into play only if the claims at issue are arbitrable in the first instance, and if there is a valid agreement to arbitrate. *See Phillips*, 173 F.3d at 937-38. This court has held that a claim such as Baker's is arbitrable; the ADA does not prohibit arbitration of a claim arising under that statute. *See Austin* v. *Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) ("The language of the [ADA] could not be any more clear in showing Congressional favor towards arbitration."); *see also Phillips*, 173 F.3d at 937. However, the question remains whether Mr. Baker and Waffle House

entered into an agreement to arbitrate that would require Mr. Baker to arbitrate any ADA claim arising from his employment at the WCWH.

Whether a contract to arbitrate exists is "an issue for judicial determination to be decided as a matter of contract." *Johnson* v. *Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998) (citing *AT & T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)). In deciding this issue, we should apply "ordinary state-law principles that govern the formation of contracts." *Johnson*, 148 F.3d at 377 (quoting *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)).

South Carolina law supports the district court's conclusion here. In recognition of the fact that Mr. Baker did not accept the offer of employment at the CWH, the district court held that "no employment agreement came into being following Baker's signing of the application form on June 23, 1994." The formation of contracts under South Carolina law "is governed by well-settled principles." *Carolina Amusement Co.* v. *Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122, 125 (1993).

> Quite simply, [a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

Id. (internal citations and quotation marks omitted).

When the manager at the Columbia Waffle House offered Mr. Baker a job, the terms of *that* offer included the provisions of the employment application, which Mr. Baker had completed in the restaurant on June 23, 1994, while the restaurant manager was sitting next to him. Those terms were part of the "bargained-for exchange" offered by the manager of the CWH.[13] "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981); *see also Prescott* v. *Farmers Tel. Coop.*, 335 S. C. 330, 516 S.E.2d 923, 926 (1999). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement*, 437 S.E.2d at 125 (citations omitted). Without an acceptance of an offer, there can be no contract. *Id.*; *see also* Restatement (Second) of Contracts § 35 cmt. c.

Because Mr. Baker declined to accept the job offered on June 23, 1994, by the manager of the CWH, no employment agreement was formed. *Id.* Under settled legal principles, the terms of the rejected offer, including the provisions of the employment application,

[13] Indeed, at the top of the application in large, bold, capital letters, Waffle House states the following requirement:

MUST BE COMPLETED IN THE RESTAURANT

J.A. 26. The choice of the definite article "the" is telling. Which restaurant must the application form be completed in? The answer is obvious—*the* Waffle House restaurant to which the job applicant is applying.

In Mr. Baker's case, he did just what the form required—he completed the employment application in the Columbia Waffle House—the restaurant to which he was applying when he filled out the application.

did not survive the rejection of the offer. Mr. Baker's power of acceptance of *that* offer was terminated by his rejection of it. *See* Restatement (Second) of Contracts §§ 36, 38 (when offeree rejects offer, his power of acceptance is terminated).

When Mr. Baker, three weeks later, traveled to the West Columbia Waffle House and orally applied for a job there, its manager, Mr. Bradley, made Mr. Baker an offer for a job as a grill operator at $5.50 an hour. Mr. Baker accepted Mr. Bradley's offer on the spot. There is no evidence that the provisions of the June 23, 1994 employment application were adopted, or even discussed, as part of the employment agreement that came into being three weeks later at the West Columbia Waffle House. *See Player* v. *Chandler*, 299 S.C. 101, 382 S.E.2d 891, 893 (1989) (a valid and enforceable contract requires "a meeting of the minds between the parties with regard to the essential and material terms of the agreement"). Thus, there is no basis for the majority's conclusion that Mr. Baker agreed to arbitrate claims arising from his employment at the West Columbia Waffle House.[14]

B.

In its opinion, the majority simply relies on its own assumptions about corporate practices, as if those are somehow dispositive of the question whether an agreement to arbitrate has been formed, while ignoring the

[14] It is undisputed that when Mr. Baker spoke with Mr. Bradley about a job at the WCWH, Mr. Bradley mentioned neither arbitration nor anything else about the way disputes were settled between Waffle House and its employees.

district court's factual findings.[15] The majority's holding—that the "generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him," *ante* at [7a]—creates an unprecedented rule that has disturbing implications beyond the injustice done to Mr. Baker.

Under the rule the majority creates today, the terms contained in an employment application submitted to one facility in a restaurant chain, or any other business chain, become binding on the job applicant if she is subsequently hired by another facility in the same chain. In effect, the terms contained in the employment application, including the mandatory arbitration provision, become free-floating, ready to bind the unsuspecting job applicant whenever and wherever she might obtain employment with the same chain. It is not surprising that the majority fails to cite any authority to support its conclusion. As explained above, the majority's holding is untenable under fundamental principles of contract law.[16]

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[15] Indeed, the majority substitutes its assumptions for the district court's findings, and fails to review or analyze the district court's findings for clear error. *See* Section I.

[16] In addition, I believe that even under the majority's theory—that the employment application "followed" Mr. Baker to the West Columbia Waffle House—the arbitration provision would be unenforceable.

First, the arbitration provision mandates that the employee pay one-half of the costs and expenses of arbitration, *see supra* note 1 ("The costs and expenses of the arbitration shall be borne evenly by the parties"). At least three of our sister circuits have held that a mandatory arbitration agreement that requires an employee to pay a portion of the arbitrator's fees is unenforceable under the

The majority's rule has no temporal or geographical limits. For example, suppose a student submits an employment application to a McDonald's in North

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Federal Arbitration Act. *See Shankle* v. *B-G Maintenance Mgmt. of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). These courts reasoned that if an employer requires an employee to agree to mandatory arbitration as a condition to obtaining or continuing employment, thereby prohibiting the employee from using the judicial forum to vindicate his rights, then the employer must provide an accessible alternative forum. *See, e.g., Shankle*, 163 F.3d at 1235. If an arbitration agreement requires the employee to pay a portion of the arbitrators' fees—which often may amount to thousands of dollars—an accessible forum is, in effect, unavailable, because of the disincentive to arbitrate created by such fees. *Id.* Under these circumstances, an employee like Mr. Baker is unlikely to pursue his statutory claims. *See Cole*, 105 F.3d at 1484 (noting that arbitration fees "are unlike anything that [employee] would have to pay to pursue his statutory claims in court"). As the Tenth Circuit reasoned, "[s]uch a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws." *Shankle*, 163 F.3d at 1235 (citations omitted).

Second, the mandatory arbitration provision would be unenforceable because it is so inconspicuous that it failed, as a matter of law, to provide Mr. Baker with sufficient notice that he was waiving his right to a judicial forum for his statutory claims. *See Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20-21 (1st Cir. 1999). In *Rosenberg*, the First Circuit interpreted the Supreme Court's decision in *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L.Ed.2d 361 (1998), and a provision of the 1991 Civil Rights Act (which is also included in the ADA), as requiring that "there be some minimum level of notice to the employee [who is a party to a private arbitration agreement] that statutory claims are subject to arbitration". *Rosenberg*, 170 F.3d at 20-21. With its buried arbitration provision, Waffle House failed, as a matter of law, to provide such "minimum level of notice" to Mr. Baker that he was required to arbitrate his ADA claim. *See Rosenberg*, 170 F.3d at 20.

Carolina, and is offered but declines a position there. Then, months or years later, she seeks and obtains employment at a McDonald's in Maryland without submitting another written employment application. Under the majority's rule, she would be bound by the terms of the employment application submitted earlier in North Carolina.

Moreover, if a job applicant wishes to escape the stranglehold of the "generic, corporation-wide employment application," he must specify *his* "intent to limit the application to a particular location." *Ante* at [6a-7a]. The Waffle House application, however, does not request the applicant to specify which Waffle House locations he is applying for. And the application form itself clearly assumes that the job seeker is applying for a position at *the* restaurant where he obtained and completed the application. Yet the majority would nonetheless require the job applicant—rather than the corporation that drafted the terms of the employment application—to specify his intent, which is not asked for, to limit the application to a particular location. To place such a duty on job applicants is patently unfair and unwarranted.

Common sense tells us that a person who physically goes to the Wal-Mart in Lewisburg, West Virginia, is applying for a job at *that* Wal-Mart, not one in Richmond, Virginia, or Charlotte, North Carolina, absent express negotiations to the contrary. He would not reasonably expect that the employment application submitted to the Lewisburg Wal-Mart would be considered an application to work in Richmond or Charlotte. The majority sets a trap for the unwary job

applicant by the counterintuitive rule that it has created today.

III.

Because I agree with the district court that there was no agreement to arbitrate between Waffle House and Mr. Baker, I would affirm its ruling and permit the EEOC to pursue both injunctive and "make-whole" relief on behalf of Mr. Baker.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action No. 3:96-2739-0

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Mar. 23, 1998
Entered: Mar. 24, 1998]

ORDER

This case is before the Court pursuant to a report and recommendation submitted by United States Magistrate Judge Joseph R. McCrorey, to whom it was referred for review under 28 U.S.C. § 636 and this Court's local rules. The plaintiff Equal Employment Opportunity Commission (EEOC) commenced this action against the defendant Waffle House, Inc. pursuant to the Americans with Disability Act (ADA), 42 U.S.C. § 12117(a) and Title VII of the Civil Rights Law of 1964, 42 U.S.C. § 2000e-5(s)(1) and (3) and pursuant to the Civil Rights Act of 1991, 42 U.S.C. § 1981a to correct alleged unlawful employment practices based on disability and to provide appropriate relief to Eric Scott

who, EEOC alleges, was adversely affected by such practice. Defendant Waffle House has filed a motion to dismiss and a petition to stay the proceedings and compel arbitration. Waffle House requests that arbitration be compelled pursuant to § 4 of the Federal Arbitration Act (FAA) 9 U.S.C. § 4 and that, because the claims must be arbitrated that the action be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Upon review, the Magistrate Judge observes that on June 23, 1994 Baker went to the Waffle House restaurant in Columbia, South Carolina and signed an Application for employment while sitting in a booth in the restaurant with the restaurant manager. At the bottom of the first page of the employment application is the following statement:

> The Parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made.

Baker was offered a job by the manager of the Columbia Waffle House, Inc. which he did not accept.

Approximately three weeks later, Baker sought and was offered employment at the Waffle House Restaurant in West Columbia, South Carolina, which he accepted. On August 26, after he arrived at work but

before beginning work, Baker felt he was going to have a seizure. After sitting down in a back room of the restaurant, he had a seizure which lasted approximately thirty seconds and, thereafter, he went home for the day. When Baker returned to Waffle House, the manager told him he could not return to work because of his seizures. Thereafter, on September 5, 1994, Baker's employment was terminated.

Baker filed a charge of discrimination with the EEOC in which he alleged that his discharge constituted a violation of the ADA. The matter was initially referred to the South Carolina Humans Affair Commission for investigation which thereafter failed to find reasonable cause to conclude that Baker's charge was discriminatory. The matter was then referred back to EEOC for review. After conducting its own investigation, EEOC concluded that there is reasonable cause to believe that Baker's charge violated the ADA.

Following his thorough review and correct statement of applicable legal authorities, the Magistrate Judge observes that, under the FAA, parties can petition federal courts to enforce arbitration agreements and he correctly observes that, in determining whether to compel arbitration or that employment dispute, the court must consider (1) whether the parties have made an agreement to arbitrate; (2) the scope of the agreement; and (3) whether the federal statutory claims are arbitrable. *Mitsubishi* v. *Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). EEOC argues that Baker did not voluntarily or knowingly agree to arbitrate his ADA claims because (1) Baker never signed a job application pertaining to the job for which he was employed; (2) a reasonable person would not have seen

and understood the arbitration provision; and (3) Baker's bargaining position was substantially inferior to that of Waffle House. Rejecting EEOC's contention that Baker never signed a job application pertaining to the job for which he was employed, the Magistrate Judge concluded that the June 23, 1994 application form which Baker signed at the Columbia Waffle House "appears to be a general job application and did not restrict application to a certain position at Waffle House" and that by subsequently accepting employment at the West Columbia Waffle House, Baker "appears to have assented to be bound by the prior agreement, that if employed he would submit his claim to arbitration." Accordingly, the Magistrate Judge concluded that an arbitration agreement exists between Baker and Waffle House and he recommends that the Waffle House petition to compel arbitration and stay proceedings be granted. He also recommends that Waffle House's motion to dismiss be denied.

EEOC objects to the recommendation upon several grounds which will not at this time be discussed. Instead, this Court has *sua sponte* inquired concerning the existence of evidence that Baker and Waffle House made an agreement to arbitrate with respect to the job that he accepted. The facts stated by the Magistrate Judge which are extrapolated from the pleadings do not suggest that an employment agreement came into being following Baker's signing of the application form on June 23, 1994. Baker left the Columbia Waffle House without accepting employment. It does not appear from the statement of facts relied upon the Magistrate Judge that when Baker went to the West Columbia, South Carolina Waffle House, the management there knew of or had the benefit of the application

form which Baker had previously signed. Instead, it appears that Baker orally applied for and was orally given a job which he accepted. That being the case, it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate. For that reason, I am unable to agree with that portion of the Magistrate Judge's conclusions. Upon consideration, I am of the opinion that the motion to dismiss and the motion to compel arbitration should be and they are hereby DENIED.

IT IS SO ORDERED.

/s/ MATTHEW J. PERRY
MATTHEW J. PERRY
SENIOR UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina,
March 20, 1998

APPENDIX C

UNITED STATES COURT OF APPEALSFOR THE FOURTH CIRCUIT

No. 98-1502
CA-96-2739-3-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INC., DEFENDANT-APPELLANT

[Filed: Jan. 14, 2000]

On Petition for Rehearing and Rehearing En Banc

Appellee filed a petition for rehearing and rehearing en banc.

Judge Niemeyer and District Judge Lee voted to deny the petition. Judge King voted to grant the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc.

Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc and Judges Murnaghan, Michael, Motz and King voted to hear the case en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:96-2739-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

VS.

WAFFLE HOUSE, INC., DEFENDANT

[FILED: May 9, 1997
ENTERED: May 12, 1997]

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

The plaintiff, Equal Employment Opportunity Commission ("EEOC"), filed its complaint in this court on September 9, 1996. The defendant is Waffle House, Inc. ("Waffle House"). EEOC brings this discrimination action pursuant to Section 107(a) of under [*sic*] the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12117(a), including reference to § § 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(f)(1) and (3) and pursuant to Section 102 of the Civil Rights Act of 1991 ("CRA"), 42 U.S.C. § 1981a. EEOC states that the action was brought to

correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker ("Baker"), who was adversely affected by such practices. Complaint, at 1-2. On December 2, 1996, Waffle House filed a motion to dismiss and a petition to compel arbitration and stay proceedings. Waffle House requests, pursuant to § 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, that arbitration be compelled in the dispute brought by the EEOC on behalf of Baker and that, because the claims must be arbitrated, the action be dismissed for the failure to state a claim, Fed. R. Civ. P. 12(b)(6), or in the alternative, pursuant to § 3 of the FAA, that the proceedings be stayed pending the outcome of arbitration. Waffle House argues that the plaintiff signed an employment application containing an arbitration agreement covered by the FAA and therefore that Baker's dispute must be submitted to arbitration. On December 22, 1996, EEOC filed a memorandum in opposition to Waffle House's motion (EEOC Opp. Mem.) to dismiss and petition to compel arbitration and stay proceedings, accompanied by affidavits from David R. Treeter, Golphin Hankinson, Joseph Doherty, and Baker. EEOC argues that Waffle House's motion must be denied because: (1) EEOC is not subject to the arbitration provision at issue in this case; (2) claims filed under the Americans with Disabilities Act and the Civil Rights Act of 1991 are not subject to mandatory arbitration; and (3) Eric Scott Baker did not knowingly or voluntarily enter into an agreement to arbitrate claims relating to his employment. Waffle House filed a memorandum in reply to EEOC's opposition memorandum on January 13, 1997. On April 30, 1997, Waffle House filed a supplemental memorandum in support of its motion to dismiss and petition to compel arbitration and stay proceedings.

FACTS

Eric Scott Baker, who was twenty years old at the time of the alleged incidents, is a high school graduate. He has a seizure disorder which is generally controlled by medication. On June 23, 1994, Baker went to a Waffle House in Columbia, South Carolina and completed and signed a Waffle House application for employment. He completed the form while sitting in a booth at the restaurant with the restaurant manager. At the bottom of the first page of the employment application are four lines of small print which read:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made.

Upton Aff., Ex. A. The manager offered Baker a position, which Baker declined. Approximately three weeks later, Baker spoke with Mike Bradley, manager of a Waffle House in West Columbia. Bradley offered Baker the position of grill operator, at a salary of $5.50 an hour. Baker started working for Waffle House on August 10, 1994. On August 26, after Baker arrived at work, but before beginning work he felt that he was going to have a seizure. After sitting down in the back room of the restaurant, he had a seizure that lasted about thirty seconds. He then went home for the day. Baker states that he called Waffle House about his

work schedule and was told that he could not return to work until Bradley returned from vacation the next week. Baker states that when he went back to Waffle House, Bradley told him that he could not return to work because of his seizures. Waffle House discharged Baker on or about September 5, 1994. Baker filed a charge of discrimination with the EEOC in which he alleged that his discharge constituted a violation of the ADA. Baker's charge was initially deferred to the South Carolina Human Affairs Commission ("SCHAC") for investigation. SCHAC ultimately concluded that there did not appear to be reasonable cause to find that Baker's discharge was discriminatory. The matter was then referred to EEOC for review. EEOC conducted its own investigation of Baker's claim, issued its conclusion that there did appear to be reasonable cause to believe that Baker's discharge violated the ADA, and attempted conciliation.

DISCUSSION

1. FAA

The FAA was reenacted and codified in 1947 for the purposes of reversing the "longstanding judicial hostility" to arbitration agreements and placing arbitration agreement[s] on par with other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The primary substantive portion of the FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce[17] to settle by arbitration a controversy thereafter

[17] Waffle House argues, and EEOC does not appear to dispute, that the "involving commerce" provision is satisfied because Waffle House operates a multi-state restaurant chain which is heavily

arising out of such contract or transaction...shall be valid, irrevocable, and enforceable . . ." 9 U.S.C. § 2. The Supreme Court has explained that in general, the FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

EEOC argues that Baker falls into the exception of the FCC that excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). In *Gilmer*, the Supreme Court explicitly declined to decide whether this language excludes from coverage all contracts of employment. *See Gilmer*, 500 U.S. at 25 n. 2. Most courts addressing the issue, however, have read this language very narrowly, applying it only to seamen, railroad workers, and other workers personally engaged in moving goods through interstate commerce, *see e.g., Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Eng'g Inc. v. United Elec. Radio & Mach. Workers*, 207 F.2d 450, 453 (3d Cir. 1953), although the Third, Sixth, and Ninth Circuits have in dicta cast some doubt on this

involved in interstate commerce for the procurement of its food products, advertising, and other operating services and supplies. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 839 (1995) (involving commerce language satisfied if the transaction remotely involved interstate commerce).

interpretation. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1112 n. 1, 1119-20 (3d Cir. 1993); *Mago* v. *Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1992); *Willis* v. *Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310-311 (6th Cir. 1991) (explicitly adopting a broad reading of § 1).

The Fourth Circuit alluded to this issue over forty years ago. In *United Electrical, Radio, & Mach. Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954), the Fourth Circuit wrote:

> [T]he arbitration clause in the collective bargaining agreement here does not cover the matter of damages arising out of violation of the no-strike clause and that the provisions of the United States Arbitration Act may not be relied on to stay proceedings in a suit brought on a collective bargaining agreement entered into by workers engaged in interstate commerce as those here were engaged.

Id. at 224. The Court continued, however,

> It appears that the exclusion of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute . . . No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions grafted on them by collective bargaining agreements.

Id. (emphasis added). Thus, it does not appear that *Miller Metal* indicates that the Fourth Circuit would read § 1 of the FAA to exclude broadly all individual employment contracts from FAA coverage. The Supreme Court, in *Gilmer*, which held enforceable an arbitration provision compelling arbitration of an alleged Age Discrimination in Employment Act (ADEA) violation, simply affirmed the result and reasoning reached by the Fourth Circuit in that same case. *See Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990). Further, other Fourth Circuit and District Court opinions support such a view. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (extending *Gilmer* to the collective bargaining context); *see also Reeves v. Commercial Credit Corp.*, 955 F. Supp. 567, 569 (D.S.C. 1997) (the exclusion contained in 9 U.S.C. § 1 "should be narrowly interpreted to apply only to those employees actually engaged in the transportation industry"); *Rudolph v. Alamo Rent A Car, Inc.*, 952 F. Supp. 311, 314 (E.D. Va. 1997) (holding that the FAA applied to an employment contract, notwithstanding the narrow exclusionary clause contained in 9 U.S.C. § 1); and *Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952, 958 (D. Md. 1994) ("this Court is of the view that the Fourth Circuit would not, as of this date, apply the words used in *Miller Metal* so as to exclude § 1's application in all non-collective bargaining contexts, and would instead apply the views expressed by a majority of courts that as to non-collective bargaining contracts the FAA excludes only those workers involved in the interstate transportation of goods."). Further, in a recent case similar to Baker's, the District Court for the Northern District of Illinois determined that an employment application qualified as a valid contract to ar-

bitrate. *Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997).

Under the FAA, parties can petition the federal courts to enforce arbitration agreements. 9 U.S.C. § 4. If the court finds the issue arbitrable, it must stay the claim. 9 U.S.C. § 3; *Cherry v. Wertheim Schroder and Co., Inc.*, 868 F. Supp. 830, 836 (D.S.C. 1994). In determining whether to compel arbitration of an employment dispute, the court must consider: (1) whether the parties have made an agreement to arbitrate; (2) the scope of the agreement; and (3) whether the federal statutory claims are arbitrable. *See Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 765 (D. Conn. 1996) (citing *Genesco, Inc. v. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987); *see also Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

2. Agreement to Arbitrate

Waffle House argues that the arbitration clause contained in Baker's employment application is a valid agreement to arbitrate. EEOC argues that the arbitration agreement should not be enforced because he did not knowingly and voluntarily enter into an agreement to arbitrate employment claims. EEOC further argues that it should not be subjected to arbitration, because it was not a party to the arbitration provision and because it requests additional relief on behalf of other Waffle House employees.

a. Baker's Arbitration Agreement

EEOC argues that Baker did not voluntarily or knowingly[18] agree to arbitrate his ADA claims because: (1) Baker never signed a job application pertaining to his job, (2) a reasonable person would not have seen and understood the arbitration provision, and (3) Baker's bargaining position was substantially inferior to that of Waffle House. Waffle House contends that the job application which Baker signed did not contain language limiting its effectiveness to a specific job or limited period of time, and that Baker knowingly and voluntarily executed the arbitration agreement.

EEOC cannot show that Baker did not voluntarily or knowingly agree to arbitrate his claims relating to employment on the theory that Baker never signed a job application pertaining to the job he held. Baker completed and signed a Waffle House job application form on June 23, 1994. Baker declined the first position he was offered, but accepted another position with Waffle House and began working for Waffle House on August 10, 1994. The application appears to be a general job application and did not restrict the application to a certain position with Waffle House. Baker did not complete the "job applied for" question. Upton Aff., Ex. A. Further, by accepting employment, Baker appears to have assented to be bound by the prior agreement, that if employed, he would submit his

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[18] The EEOC argues that under South Carolina state law and public policy, as well as under the FAA as interpreted in *Austin* and *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994) *cert. denied*, ____U.S.____, 116 S.Ct. 61 (1995), an arbitration agreement is only valid if it was entered voluntarily and knowingly.

claim to arbitration. EEOC next argues that Baker did not knowingly and voluntarily execute the arbitration agreement because a reasonable person would not have seen and understood the arbitration provision because it did not comply with the notice provisions of the South Carolina Arbitration Act. *See* S.C. Code Ann. § 15-48-10 (providing that a notice that a contract is subject to arbitration under the South Carolina statute must be clearly distinguishable, with the notice typed in underlined capital letters, or prominently stamped on the first page of the contract). The South Carolina Arbitration statute does not have to be met for the provision to be valid in this case because the FAA preempts state statutes in agreements covered by the FAA. *See Doctor's Associates, Inc.* v. *Casarotto*, ____U.S. ____, 116 S. Ct. 1652, 1656 (1996) (courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions); *Soil Remediation Co.* v. *Nu-Way Environmental, Inc.*, 476 S.E.2d 149 (S.C. 1996) (FAA preempts the notice provision of the South Carolina Arbitration Act where the presence of interstate commerce makes the FAA applicable).

Finally, EEOC alleges that the arbitration provision was not valid because Baker did not read the provision, because the provision was not explained to him, and Baker's bargaining position was substantially inferior to that of Waffle House. "Generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." *Soil Remediation*, 476 S.E.2d at 151. Here, however, EEOC has not alleged that the provision was executed under any of those conditions. Baker is a high school graduate. EEOC has not alleged that he is unable to read and

understand. "One who is capable of reading and understanding but fails to read a contract before signing is bound by the terms thereof." *Sims v. Tyler*, 281 S.E.2d 229, 230 (S.C. 1981). Further, "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer* 500 U.S. at 32; *see also Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1450 (D. Minn. 1996) (holding that agreement to arbitrate contained in an "agreement of hire" was enforceable; employer's failure to explain provisions of arbitration clause coupled with superior bargaining power it enjoyed as an employer within the marketplace did not invalidate the agreement).

b. EEOC

The EEOC argues that it should not be subjected to arbitration, because it did not sign the employment application and because, although it seeks individual relief for Baker, it requests that the Court enjoin Waffle House from engaging in discriminatory employment practices and order that Waffle House institute and carry out policies, practices, and programs which provide equal employment opportunities and eradicate the effects of its unlawful employment practices. EEOC Opp. Mem. at 5, Complaint, 3-4. EEOC argues that its right of action is independent of Baker's private action right. Waffle House argues that the EEOC has made it clear that it is suing on Baker's behalf and that any issue regarding the availability of injunctive relief could be accommodated by the retention of jurisdiction for the purpose of weighing the need for injunctive relief if the arbitrator determines that Baker was the victim of unlawful discrimination.

EEOC cannot show that it may bring claims on behalf of Baker so that Baker can avoid the arbitration agreement. *See, e.g., EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987) (concluding that an individual's settlement of her personal claims renders those personal claims moot). With regard to Baker's claims, EEOC appears to be bringing suit on Baker's behalf or "standing in his shoes." As noted before, EEOC stated in the complaint that it brings this action to provide relief to Baker and EEOC requests monetary relief for Baker. *See* Complaint at 1, 4. Further the EEOC's response to the interrogatories required by Local rule 7.04 DSC reveal that this action is brought on Baker's behalf.[19] Finally, EEOC does not make any allegations of ADA or CRA violations independent of the action set forth on behalf of Baker.

EEOC does seek additional injunctive relief, however, "to correct unlawful employment practices on

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[19] The EEOC, in response to interrogatory number five, writes:

> The Commission brings this action on behalf of Eric Scott Baker. Based on the information currently available to the Commission, the Commission will seek damages for Mr. Baker as follows:
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> a. back pay in an amount sufficient to compensate Mr. Baker for the period from September 4, 1994, the date that Mr. Baker was terminated, through the date of trial, less amount earned in mitigation;
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> b. prejudgment interest;
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> c. compensatory damages for out-of-pocket expenses, emotional distress, mental anguish and loss of self-esteem, in an amount to be determined at the time of trial;
>
> d. punitive damages in an amount to be determined at the time of trial.

the basis of disability." Complaint, at 1. "Arbitration agreements do not preclude EEOC from seeking class-wide and equitable relief." *Gilmer*, 500 U.S. at 212. EEOC has standing, by itself, to challenge ongoing discriminatory practice even if the employee has settled his claims. *See EEOC v. United Parcel Service*, 860 F.2d 372, 375 (10th Cir. 1988). The settlement of an employee's claim "does not moot the EEOC's right of action seeking injunctive relief to protect employees as a class and to deter the employer from discrimination." *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d at 1543. EEOC may have a cause of action, separate from Baker's claims for injunctive relief. Thus, the undersigned concludes that EEOC's claims for injunctive relief should not be dismissed, but rather should be stayed pending the outcome of the arbitration process.

3. Scope of the Agreement

EEOC appears to argue that Baker's ADA claims are not within the scope of the arbitration clause. Waffle House argues that the arbitration agreement clearly identifies the issues subject to arbitration. EEOC argues that the Ninth Circuit found that an arbitration provision that "did not even refer to employment disputes" is invalid, *see Lai*, 42 F.3d 1305, and appears to argue that the arbitration clause must specifically identify the type of dispute covered by the agreement. The arbitration clause in Baker's employment application, however, specifically includes "any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether

such dispute or claim is arbitrable. . ." Upton Aff., Ex. A.

Here, the scope of the arbitration clause is broad and thus encompasses the ADA and CRA claims. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Cherry*, 868 F. Supp. at 834 (*citing Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985); *see also Reese*, 955 F. Supp. at 571.

4. Applicability of Arbitration Policy

EEOC argues that ADA and CRA claims should not be subject to arbitration because Baker did not voluntarily agree to arbitrate these claims. Further, EEOC argues that the arbitration scheme is not sufficient to address the claims.

Statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. *Gilmer*, 500 U.S. at 26. "By agreeing to arbitrate a statutory claim, a party does not forgo substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi*, 473 U.S. at 628. The FAA reflects a strong federal preference toward enforcing arbitration agreements. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Supreme Court has stated:

> "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes.

Gilmer, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

Although EEOC agrees that both the ADA and the CRA favor alternative dispute resolution, it argues that the legislative history of both statutes makes clear that the alternative dispute resolution must be voluntary and that it is not voluntary in this case. The ADA provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212. The Fourth Circuit, in *Austin* found that mandatory arbitration agreements signed as a condition of employment were appropriate and consistent with both the ADA and the CRA. *Austin*, 78 F.3d at 881 ("The meaning of this [ADA] language is plain–Congress is in favor of arbitration."); *see also McRea v. Drs. Copeland, Hyman & Shackman*, 945 F. Supp. 879 (D. Md. 1996) (holding that arbitration provision in employment contract was enforceable with respect to claims under the Civil Rights Act of 1866 and Title VII of the Civil Rights Act of 1964). A recent amendment to Title VII includes a specific expression of Congressional support for arbitration:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081. Court have consistently found that Title VII claims are arbitrable. *See e.g., Mago*, 956 F.2d at 935 (rejecting argument that Title VII evinces congressional intent to preclude arbitration in the context of privately negotiated employment contracts).

Although EEOC argues that Baker did not voluntarily agree to arbitration, there is not an assertion that Baker could not read or understand, or that the arbitration agreement was the result of fraud, coercion, or duress. The EEOC cannot show such an agreement was not voluntary. *See Austin*, 78 F.2d at 885 (arbitration agreements executed by registered brokers as a condition of employment were sufficiently voluntary to be enforceable).

The EEOC also argues that the arbitration scheme is not sufficient to address Baker's claims because it is not clear what remedies are available in arbitration, strict rules of evidence are not followed, the right to judicial *de novo* trial is lost, and arbitration is financially burdensome. Waffle House argues that the Supreme Court has flatly rejected the EEOC's argument that arbitration is inadequate to address Baker's ADA claim.

The EEOC cannot show that arbitration is inadequate for Baker's claims. The Supreme Court in *Gilmer* rejected arguments that arbitrators would be biased, did not issue written opinions, was inadequate in terms of relief, and provided limited discovery by stating:

> Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to

> would-be complaints," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."
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> * * * * *
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> Although those procedures [used in arbitration] might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Gilmer, 500 U.S. at 30-31 (internal citations omitted). Further, "arbitrators do have the power to fashion equitable relief." *Id.* at 32.

CONCLUSION

An arbitration agreement exists between Baker and Waffle House; Baker's claims under the ADA and CRA fall within the scope of the agreement; and the EEOC can show no express Congressional intent to preclude a waiver of judicial remedies for a violation of Baker's rights under the ADA or the CRA. It is, therefore,

RECOMMENDED that Waffle House's motion to dismiss be denied and that, pursuant to 9 U.S.C. § 3, Waffle House's petition to compel arbitration and stay proceedings be granted.

Respectfully Submitted,

/s/ JOSEPH R. McCROREY
JOSEPH R. MCCROREY

May 9, 1997

Columbia, South Carolina

APPENDIX E

1. Section 1981a(1) and (2), (b) and (d) of Title 42 of the United States Code provides:

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * * * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual .

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

* * * * *

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means-

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

2. Section 2000e-5 of Title 42 of the United States Code provides in pertinent part:

* * * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure;

appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed

a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involv-

ing a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case.

In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by

the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

3. Section 12117 of Title 42 of the United States Code provides in pertinent part:

Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

4. Title 9 of the United States Code provides:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any

State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

(2)

No. 99-1823

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT OF WAFFLE HOUSE, INCORPORATED

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Waffle House, Incorporated, through its attorneys, respectfully submits this Corporate Disclosure Statement.

Waffle House, Inc. has no parent company. Waffle House has several subsidiary companies. However, none of these subsidiaries are publicly traded.

QUESTION PRESENTED

Does an employee's agreement to arbitrate employment-related disputes with an employer preclude the Equal Employment Opportunity Commission from seeking victim-specific remedies for discrimination against the employer, such as backpay, reinstatement and damages, in an enforcement action filed in Federal Court against the employer?

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RESPONDENT'S BRIEF IN OPPOSITION

For the following reasons, Respondent respectfully suggests that the Petition for a Writ of Certiorari should be denied.

STATEMENT

This case involves the efforts of the Equal Employment Opportunity Commission ("EEOC" or "Petitioner") to seek make-whole relief under the Americans with Disabilities Act ("ADA") on behalf of Eric Scott Baker ("Baker") based on discrimination allegedly committed by Waffle House, Inc. ("Waffle House" or "Respondent"). The United States Court of Appeals for the Fourth Circuit held that the arbitration agreement signed by Baker when he applied for employment with Waffle House barred recovery by the EEOC of such individualized monetary or equitable relief.

1. Factual Background.

Baker, the sole individual on whose behalf the EEOC filed this action, began working for Waffle House on or about August 10, 1994. On June 23, 1994, Baker completed and signed a Waffle House employment application that contained the following arbitration provision:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc. or any subsidiary of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

(C.A. App. at 26).

Baker did not specify on his employment application that he was applying for any specific position or employment at any specific restaurant. Baker did not respond to the application's question asking "Position(s) applied for?" (C.A. App. at 26).

The hiring process that led to Baker's employment was a continuous chain of interrelated events during which Baker was specifically referred from one manager to the next, commencing with Waffle House's District Manager, Lee Motlow, and ending with Restaurant Manager, Mike Bradley. According to the EEOC's description of the series of events that led to Baker's employment,[1] Baker:

(1) first met with Waffle House's District Manager Lee Motlow;

(2) Motlow referred Baker to a specific Waffle House restaurant;

(3) Baker met with the manager of the Waffle House restaurant to which he had been referred by District Manager Motlow;

(4) the restaurant manager at the restaurant to which Baker had been referred by Motlow hired Baker to work at another nearby

---

[1]This description is taken from the detailed factual recitation offered by the EEOC in its standard interrogatory responses made pursuant to D.S.C. Local Rule 26.03. The Local Rules of the United States District Court for the District of South Carolina provide that these mandatory interrogatory responses "may be relied upon and used in the same manner as discovery responses obtained under the Federal Rules of Civil Procedure." D.S.C. Local Rule 26.02.

Waffle House, unit number 446, in West Columbia;

(5) Baker then went to the West Columbia restaurant, met with the Restaurant Manager named Mike Bradley, agreed on a starting date and thereafter commenced working on August 10, 1994.

(C.A. App. at 13).[2]

[2]After it had filed its standard interrogatory responses, and in response to Waffle House's petition to compel arbitration, the EEOC submitted Baker's affidavit which also described the events leading to Baker's employment by Waffle House. A comparison of Baker's affidavit with the EEOC's interrogatory response reveals that Baker's affidavit simply omits relevant facts about Baker's initial meeting with Motlow and Motlow's subsequent reference of Baker to Bradley. The relevant portion of Baker's affidavit read:

> 2. On June 23, 1994, I went to the Waffle House facility at I-26 and S.C. 302, in Columbia, South Carolina, and completed a Waffle House Application for Employment. I was twenty years old at that time.
> 3. I completed the Waffle House Application for Employment while I was sitting in a booth at the restaurant.
> 4. A manager was sitting with me while I completed the application form.
> . . .
> 10. The manager hired me; however, I subsequently declined the job offer.
> 11. A few weeks after the job offer, I spoke with Mike Bradley, manager of another nearby Waffle House, Unit #446 in West Columbia, South Carolina, and Bradley offered me a job at Unit #446, which I accepted.
> 12. I did not have to reapply or take another math test when I was offered the job at Unit #446.

(C.A. App. at 28-29). The only meaningful difference between the EEOC's interrogatory response and Baker's affidavit, was the omission of the name of the first Waffle House manager with whom Baker met, who was District Manager Motlow, and the fact that Motlow referred Baker to Mike Bradley, who was the manager of the restaurant at which Baker was eventually employed.

Waffle House discharged Baker on or about September 5, 1994, after he had a seizure at work on August 26, 1994. Subsequent to his discharge, Baker filed a charge of discrimination with the EEOC in which he alleged that his discharge constituted a violation of the ADA.

Baker's charge was initially deferred to the South Carolina Human Affairs Commission ("SCHAC") for investigation. SCHAC ultimately concluded that there did not appear to be reasonable cause to find that Baker's discharge was discriminatory. The matter was then referred to the EEOC for review.

The EEOC conducted its own investigation of Baker's claim and eventually issued its conclusion that there did appear to be reasonable cause to believe that Baker's discharge violated the ADA. After issuing a Notice of Conciliation Failure and despite Baker's contractual commitment to arbitrate any dispute arising from his employment with Waffle House, the EEOC filed this action on Baker's behalf.

2. History of The Case.

The EEOC filed this action to obtain relief on behalf of Baker on September 9, 1996, and to seek an injunction based on the alleged discrimination toward Baker. The EEOC's Complaint alleged that Waffle House violated the ADA when it discharged Baker several weeks after he was hired. The EEOC sought relief solely on behalf of Baker. The EEOC did not allege there were any similarly situated individuals and did not challenge any policy or continuing employment practice of Waffle House.

On December 2, 1996, Waffle House filed a petition to compel arbitration and to stay the proceedings based on the requirements of the Federal Arbitration Act, 9 U.S.C. § 1, et seq., ("FAA"), and a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), since all claims asserted in the litigation were subject to the arbitration agreement that Baker executed as part of his application for employment with Waffle House. On May 9, 1997, after the parties had filed their respective response

and reply briefs and Waffle House had filed a supplemental brief, the Magistrate Judge to whom the matter had been referred issued a Report and Recommendation in which the Magistrate Judge recommended that Waffle House's petition to compel arbitration be granted and the EEOC's action be stayed pending arbitration. (Petitioner's App. D at 53a).

Following further briefing and oral argument on the EEOC's objections to the Magistrate Judge's Report and Recommendation, the District Court entered an Order on March 24, 1998, in which it rejected the Report and Recommendation of the Magistrate Judge. The District Court reasoned that because Baker submitted his employment application at one Waffle House location and was later employed at a different location without submitting another written application form, Baker's acceptance of employment was not made pursuant to the written application that included the agreement to arbitrate. (Petitioner's App. A at 5a-6a; App. B at 33a-34a). Accordingly, the District Court concluded that no arbitration contract existed between Waffle House and Baker, and refused to compel arbitration or grant a stay in this matter. (Petitioner's App. B at 34a).

Waffle House filed its notice of appeal to the Fourth Circuit Court of Appeals relating to the District Court's decision on March 31, 1998. After hearing oral argument on March 1, 1999, the Fourth Circuit decided on October 6, 1999, that Baker's execution of a general Waffle House,

Inc. employment application containing an arbitration clause, followed Baker to whichever Waffle House location hired him. (Petitioner's App. A at 6a-7a). Therefore, the Fourth Circuit concluded that Baker contractually agreed to arbitrate any employment related claim against Waffle House. (Id. at 7a).

Addressing the effect of Baker's agreement to arbitrate on the EEOC's enforcement rights, the Fourth Circuit concluded that the EEOC could not be compelled to arbitrate its claims against Waffle House by virtue of the arbitration agreement between Baker and Waffle House. (Petitioner's App. A at 2a, 7a-13a, 17a-18a). The Fourth Circuit also concluded, however, that because Baker was subject to an arbitration agreement, the EEOC was precluded from seeking "make-whole" relief, such as backpay, reinstatement, and compensatory and punitive damages, on behalf of Baker in a judicial forum. (Id. at 2a, 14a-18a).

On November 18, 1999, the EEOC petitioned the Fourth Circuit for Rehearing and for Rehearing En Banc. This Petition was denied by the Fourth Circuit on January 14, 2000, and the Fourth Circuit's mandate was issued on January 24, 2000.

The EEOC filed this Petition for a Writ of Certiorari on May 15, 2000. In its Petition, the EEOC asks this Court to review the Fourth Circuit's decision only insofar as it

relates to the limitation on the EEOC's ability to seek "make-whole" relief in a judicial forum on behalf of Baker.

ARGUMENT

Certiorari should be denied. Only three circuit courts of appeals have decided the issue presented by this Petition; nine circuit courts of appeals have yet to be heard on this issue. Moreover, the EEOC's petition does not present an important federal question. Instead, it presents the infrequently recurring issue of the effect of a private arbitration agreement on the remedies the EEOC may seek in an enforcement action filed in federal court. There is no evidence that the statutory aims of Title VII, the ADA and other federal employment discrimination statutes are not being adequately addressed in the arbitration forum. The Fourth Circuit's decision is consistent with the Court's precedents and strikes an appropriate balance between the competing interests of the EEOC's enforcement rights and the federal policy favoring arbitration.

1. Certiorari Is Inappropriate Because Only Three Circuit Courts Of Appeals Have Addressed The Issue Presented By This Petition.

Rule 10(a) of the Rules of the Supreme Court of the United States provides that one of the reasons the Court considers in deciding whether to grant a petition for a writ

of certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .." In this case, there is a split among the courts of appeals that have decided the effect of a charging party's binding agreement to arbitrate employment-related disputes on the EEOC's ability to seek "make-whole" relief in a judicial forum on behalf of the charging party. Nonetheless, it is premature for the Court to review this issue.

To date, only three (3) circuit courts of appeals have decided this issue: the Second Circuit in EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998); the Fourth Circuit in this case, EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999) (Petitioner's App. A); and the Sixth Circuit in EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999).

In Kidder, Peabody, a case arising under the Age Discrimination in Employment Act ("ADEA"), the Second Circuit held in a well-reasoned decision that "where the individual has freely agreed to arbitrate the ADEA claim, that decision, like the decision to waive or settle a claim, prevents the EEOC from pursuing monetary remedies on behalf of the individual in the federal forum." 156 F.3d at 302. The Second Circuit analyzed the numerous circuit court decisions which "have uniformly held that the EEOC may not seek monetary relief in the name of an employee who has waived, settled, or previously litigated the claim"

but which have at the same time "allowed the EEOC to pursue injunctive relief [on the same claim]. . . because by seeking injunctive relief, the EEOC promotes public policy and seeks to vindicate rights belonging to the United States as sovereign." Id. at 301, 302 (citations omitted). The Second Circuit reasoned that its decision was consistent with these decisions and with the need to balance the EEOC's interest in pursuing actions "to eradicate and prevent employment discrimination" with the "liberal federal policy favoring arbitration agreements" expressed in this Court's decision in Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). Id. at 302, 303. The Second Circuit also reasoned that the threat of a monetary award obtained by an individual through arbitration would have no less a deterrent effect on an employer than the threat of a monetary award obtained by the EEOC through litigation in federal court, whereas "the public interest in a back pay award [in this context] is minimal." Id. at 302, 303 (citations omitted).

After the Second Circuit decided Kidder, Peabody, the Sixth Circuit considered the same issue in Frank's Nursery, a Title VII race discrimination case, and reached a different result. After discussing at length the enforcement mechanisms provided under Title VII and the legislative

history behind the 1972 amendments to the enforcement mechanisms,[3] the Sixth Circuit determined that an arbitration agreement entered into by an employee with his employer had absolutely no effect on the EEOC's enforcement rights, including the ability to seek monetary relief on behalf of an employee who had entered into an arbitration agreement. 177 F.3d at 468. Of particular importance to the Sixth Circuit was the fact that an individual does not possess any right to sue that may be subject to an arbitration agreement, until the EEOC has relinquished its exclusive jurisdiction over the charge of discrimination. Id. at 455-56, 462. In addition, the Sixth Circuit rejected the parallel drawn by the Second Circuit to circumstances where an employee has waived, settled, or previously litigated his claim. The Sixth Circuit determined that because an employee who has merely entered into an arbitration agreement has never actually adjudicated his claim in any forum, or received any relief from the employer in settlement of his claim, there is no support to be drawn from these latter situations for limiting the EEOC's ability to pursue monetary damages on behalf of an employee who has entered into an arbitration agreement. Id. at 462-467.

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[3] In 1972, Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, as an amendment to Title VII. Pursuant to this amendment, the EEOC obtained the power to bring suit in federal court to enforce Title VII against private employers.

In considering the effect in this case of Baker's arbitration agreement on the EEOC's ability to pursue make-whole relief on behalf of Baker, the Fourth Circuit had the benefit of both the Second and Sixth Circuit's decisions. The Fourth Circuit agreed "with the balance struck by the Second Circuit" and held that the EEOC may not seek individual-specific relief in federal court on behalf of an individual who has entered into an agreement to arbitrate with his employer. (Petitioner's App. A at 15a).

Because the "split" among the courts of appeals is only 2-1, the issue presented by the EEOC's Petition has not yet sufficiently ripened to justify review by this Court. The remaining nine (9) courts of appeals have not yet had the opportunity to address this issue. It remains to be seen whether the courts of appeals will truly be divided on this issue, or whether the decision reached by the Sixth Circuit will be an aberration. Given that the majority of the decisions, from the Second and Fourth Circuits, have gone the same way on this issue, the trend appears to be in favor of limiting the EEOC's ability to seek make-whole relief in a judicial forum on behalf of an individual who has entered into an agreement to arbitrate his employment-related claims with his employer. Accordingly, this Court should defer reviewing this issue until such time as more of the courts of appeals have had an opportunity to consider and decide this issue and until it becomes clear, if ever, that the courts of appeals are truly divided on the resolution of this issue.

2. This Case Does Not Present A Conflict Meriting This Court's Review Because It Presents Only An Infrequently Recurring Issue.

Despite the EEOC's contention that the "question presented in this case can be expected to recur frequently in the near future," (Petition at 18), the fact remains that situations in which an employee's arbitration agreement with his employer may affect the EEOC's enforcement rights, represent only a minute fraction of discrimination charges that are filed.

According to the EEOC's statistics, there were 77,444 charges of discrimination filed in 1999. *See* http://www.eeoc.gov/stats/charge.html (July 5, 2000). Of these cases, the EEOC filed suit (either directly or through intervention) in only 439. See http://www.eeoc.gov/stats/litigation.html (July 5, 2000); see also Petition at 18. Thus, only .57% of all charges filed resulted in litigation by the EEOC. Of this .57%, there is no evidence that there is any meaningfully substantial number of cases in which the EEOC's ability to seek make-whole relief on behalf of the individual employee was affected by an agreement to arbitrate entered into by the employee with his employer.

In an effort to create the appearance that this issue is of greater importance than it is, the EEOC states that there is an "increasingly large number of instances in which pre-dispute arbitration agreements are a condition of employment." (Petition at 18). However, the authority cited by the EEOC notes only that as of 1997, 8.4% of employers were considering implementing mandatory arbitration programs as compared to 1.3% of employers that actually had such programs in place. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F.Supp. 190, 199 n.12 (D. Mass. 1998), aff'd, 170 F.3d 1 (1st Cir. 1999). The EEOC failed to present any evidence or authority addressing the only issues relevant to this Petition, which are (1) how frequently the EEOC's ability to seek make-whole relief on behalf of an employee may be affected by the employee's agreement to arbitrate with his employer; and (2) whether any alleged effect results in any meaningful limitation on the EEOC's ability to protect the public interests reflected in the federal anti-discrimination statutes.

The circumstances presented by this Petition will arise in only a small fraction of all actions filed by the EEOC, and an even smaller fraction of all charges that result in action by the EEOC. Therefore, the issue presented by this Petition is, at best, an infrequently arising anomaly unworthy of this Court's review.

3. This Case Does Not Present An Important Federal

Question Because There Is No Evidence That The Statutory Aims Of The ADA And Other Federal Employment Discrimination Statutes Are Not Being Adequately Addressed In The Arbitration Forum.

The EEOC's strong objection to requiring employees who have entered into arbitration agreements to arbitrate their individual claims for relief implies that the EEOC will be able to obtain more relief for the employee than the employee could obtain through arbitration. However, there is no evidence to suggest that individuals receive less relief by arbitrating their employment discrimination claims as opposed to litigating them. In the absence of such evidence, this Court cannot simply presume that the purposes of Title VII, the ADA and other federal employment discrimination statutes are not being met by requiring individuals to arbitrate their individual claims for relief in circumstances such as those presented by this Petition. Thus, until there has been sufficient experience with arbitration awards on individual claims resulting from enforcement actions filed by the EEOC, this Court is not in a position to assess whether the statutory aims of Title VII, the ADA and other federal employment discrimination statutes are being adequately addressed in the arbitration forum.

4. The Fourth Circuit's Decision Is Faithful To This Court's Precedents.

a. The Fourth Circuit's decision gives deference to the EEOC's responsibility to act in the public interest to enforce federal anti-discrimination laws.

The Fourth Circuit's decision is consistent with this Court's decision in General Telephone Co. v. EEOC, 446 U.S. 318 (1980). In General Telephone, this Court considered and decided only the narrow issue of whether the EEOC must satisfy the requirements of Federal Rule of Civil Procedure 23 when it sues on behalf of a group of employees. This Court answered this question, and only this question, in the negative. Neither arbitration generally nor the strong policy favoring arbitration expressed in the FAA were at issue in General Telephone.

The essence of the holding in General Telephone was that the EEOC need not satisfy the requirements of Rule 23 because it does not merely sue as a surrogate for the individuals on whose behalf it seeks relief. As this Court described in its discussion of the purpose of an EEOC enforcement action, the EEOC acts primarily in the public interest to enforce the federal anti-discrimination laws:

> The EEOC's civil suit was intended to supplement, not replace, the private action. [citation omitted] The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 was not superseded. . . . These private-action rights suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC enforcement rights should not be considered representative actions subject to Rule 23. Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.' 118 Cong. Rec. 4941 (1972). When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.

General Telephone, 446 U.S. at 326.

The Fourth Circuit's decision does no violence to this holding. Though the Fourth Circuit's holding bars the EEOC from seeking monetary relief on behalf of an individual who has signed an arbitration agreement, the

EEOC remains empowered to seek a federal judicial declaration that a given employer's employment practices violate the law and an injunction to prevent future violations. Forcing employers to abide by the anti-discrimination laws is the issue that has public interest implications. The Fourth Circuit's decision fully protects the EEOC's ability to protect this public interest. On the other hand, however, as found by the Fourth Circuit, the public interest in the damages paid to a specific individual because of an unlawful employment decision is negligible.

In its Petition for a Writ of Certiorari, the EEOC asserts that General Telephone stands for the proposition that in an enforcement action, "the EEOC is not a representative of private parties in litigation." (Petition at 14). The EEOC misstates this Court's decision in General Telephone by eliminating the word "merely" from the Court's statement that "the EEOC is not *merely* a proxy for victims of discrimination." Id.

The Court's choice of the word "merely" in its statement describing the EEOC's representative role in enforcement actions is not meaningless as the EEOC suggests. Indeed, the word "merely" means that the EEOC assumes another role *in addition to* being a proxy for victims of discrimination. Thus, contrary to the EEOC's assertion, General Telephone stands for the proposition that the EEOC wears two hats in an enforcement action: (1) as representative of the public interest; and (2) as representative of the individual victims of discrimination.

And, as stated by this Court, it is the former capacity that is the EEOC's "overriding" concern.

Based upon its erroneous interpretation of General Telephone, the EEOC asserts that an individual cannot limit the scope of an EEOC action by entering into a private arbitration agreement. This assertion is not supported by the decision in General Telephone. As discussed above, General Telephone recognizes that in an enforcement action, the EEOC is, in part, "a proxy for victims of discrimination." Id. Therefore, contrary to the EEOC's argument, General Telephone supports the Fourth Circuit's decision that the scope of an EEOC enforcement action may be limited by an arbitration agreement entered into by an individual on whose behalf the EEOC sues.

Likewise, the Fourth Circuit's decision is not inconsistent with this Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). In Gilmer, this Court noted that "an individual . . . claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action" and observed that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." Id. at 28-29. Neither of these assertions are contradicted or undermined by the Fourth Circuit's decision in this matter. Although the Fourth Circuit's decision bars the EEOC from pursuing individual monetary relief on behalf of an individual who has signed an arbitration

agreement, the decision does nothing to hinder either the filing of a charge or the EEOC's enforcement actions through litigation. In fact, the EEOC could hardly possess a more potent weapon against employment discrimination than a federal court's issuance of an injunction barring the unlawful conduct and the continued reporting and oversight that goes along with such an injunction. The Fourth Circuit's decision does nothing to limit the effectiveness of the EEOC's enforcement authority in vindicating the public's interests.

b. The Fourth Circuit's decision strikes an appropriate balance between the competing interests of the federal policy favoring arbitration and the EEOC's enforcement rights.

The federal policy favoring arbitration has been repeatedly emphasized by this Court. As explained in Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1 (1983), under the FAA,

> *questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.* . . . The Arbitration Act establishes that, as a matter of federal law, *any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language*

itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25 (emphasis added). This Court has also instructed lower courts to generously construe the parties' intentions in favor of arbitrability. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

To completely disregard in an EEOC enforcement action the existence of a charging party's private agreement to arbitrate his employment related claims, as the EEOC suggests, utterly disregards the federal policy favoring arbitration. Indeed, such a result would enable an individual, who was party to an agreement to arbitrate with his employer, to intervene in a lawsuit brought by the EEOC seeking remedies for discrimination on behalf of the individual, whereas he could not have brought such a lawsuit in his own right.[4] Clearly, such a result would completely circumvent the individual's agreement to arbitrate and subvert the federal policy favoring arbitration.

Contrary to the EEOC's position, the Fourth Circuit's decision properly balances the competing goals of the EEOC's enforcement powers exercised in the public interest, discussed in General Telephone, supra, against the

[4]The enforcement provisions in Title VII allow that "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . .." 42 U.S.C. § 2000e-5(f)(1).

strong national pro-arbitration policy expressed in the FAA. The EEOC's mandate to enforce the federal civil rights laws in the public interest is preserved by allowing the EEOC to continue to litigate a case for broad injunctive relief, despite the presence of an enforceable arbitration agreement signed by the employee on whose behalf the EEOC sues. At the same time, the federal policy requiring strict enforcement of arbitration agreements is preserved because the employee must pursue his individual monetary claims in arbitration pursuant to the terms of the arbitration agreement.

5. The Fourth Circuit's Decision Is Consistent With Decisions Of Other Courts Of Appeals In Which The Scope Of An EEOC Lawsuit Has Been Limited By Private Individuals.

Many cases have recognized that the scope of an action brought by the EEOC may be limited by actions taken by the individuals on whose behalf the EEOC sues. For example, in EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993), the Seventh Circuit held that the employee's individual ADEA lawsuit barred recovery by the EEOC of backpay, liquidated damages, and reinstatement on his behalf. Id. at 1291. A similar result was reached in EEOC v. United States Steel Corp., 921 F.2d 489 (3d Cir. 1990), in which the Third Circuit rejected the EEOC's overbroad interpretation of General Telephone and held:

> The absence of any formal designation of the individual claimants as parties, however, does not change the nature of the EEOC's role as the individuals' representative and should not change the effect of the doctrine of claim preclusion. By claiming or accepting individual relief won by the EEOC, the individuals would necessarily concede that the EEOC was their representative and that they were embraced by the EEOC's judgment. *For those individuals who have previously brought their own suits against USX and lost on the merits, this concession would be fatal. Having had their day in court, these individuals could not relitigate the same claim through a representative any more than they could relitigate the same claim on their own behalf.* . . . While it is true that the Commission has the responsibility to protect a vital public interest that transcends the interest of any and all aggrieved individuals, we have concluded, for the reasons previously explained, that the Commission's responsibilities include the representation of these grievants

> when it seeks individual relief on their behalf. *Thus, when the Commission seeks individualized benefits under the ADEA for particular grievants, as it did in this case, the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies.*
>
> ...
>
> Private litigation in which the EEOC is not a party cannot preclude the EEOC from maintaining its own action because private litigants are not vested with the authority to represent the EEOC. *But when the EEOC seeks to represent grievants by attempting to obtain private benefits on their behalf, the doctrine of representative claim preclusion must be applied.*

Id. at 496-498 (emphasis added).

There are also other circumstances in which the EEOC's ability to pursue individual monetary relief is limited by actions taken by the individual employee on whose behalf the EEOC sues. For instance in EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987),

the Ninth Circuit concluded that the individual employee's settlement of her personal claims "rendered her personal claims moot." Id. at 1542. Accordingly, the only relief still available to the EEOC was "injunctive relief to protect employees as a class and to deter the employer from discrimination." Id. at 1543. See also New Orleans Steam Ship Assoc. v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982) (EEOC may challenge a transaction that was the subject of a prior private action only if the EEOC seeks different relief); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975) (settling employee not entitled to recover any additional private benefit such as back pay through EEOC action).

As demonstrated by this long line of cases, the Fourth Circuit's decision should not be disturbed. Its holding that Baker's arbitration agreement with Waffle House "can circumscribe the contours of the EEOC's suit in its own name to the extent it acts on behalf of the charging party" is amply supported by precedent derived from Congressional intent, decisions of this Court, and numerous courts of appeals.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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(3)

No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 99-1823

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent concedes that "[i]n this case, there is a split among the courts of appeals that have decided the effect of a charging party's binding agreement to arbitrate employment-related disputes on the EEOC's ability to seek 'make-whole' relief in a judicial forum on behalf of the charging party." Br. in Opp. 10. Respondent also concedes that the split in the circuits is precisely the conflict that we identified in the Petition, with the Second and Fourth Circuits having ruled against the EEOC's ability to obtain "make-whole" relief in the circumstances of this case and the Sixth Circuit having permitted such relief. See Br. in Opp. 10-12. Respondent nonetheless argues that certiorari is not warranted because the issue is not sufficiently

important and because a number of other circuits have not yet addressed the issue.

I. THE CONFLICT IN THE CIRCUITS IS NOT LIKELY TO BE RESOLVED WITHOUT THIS COURT'S REVIEW

Respondent suggests that the Court should defer reviewing this issue until additional courts of appeals have addressed it, in order to determine whether the courts of appeals are "truly divided" on the issue. Br. in Opp. 13. But additional review by other circuits is unlikely either to reduce the existing conflict or to shed additional light on the issue.

First, there is no reason to believe that the conflict in the circuits will be mitigated over time. The Second Circuit first squarely addressed the issue in *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (1998), ruling against the EEOC's position. The following year, after taking specific account of the Second Circuit's decision, the Sixth Circuit in *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 465 (1999), ruled in favor of the EEOC's position, thereby creating the conflict in the circuits. After reviewing both of those decisions, the Fourth Circuit in this case sided with the Second Circuit's view in *Kidder, Peabody*. That see-saw pattern is likely to be repeated as more courts of appeals decide the issue. There is accordingly no reason to believe that the circuit split would become any less serious if review were delayed.

Second, the Sixth Circuit has already demonstrated that it will not alter its position in light of the views of other circuits. In *EEOC* v. *Northwest Airlines, Inc.*, 188 F.3d 695, 701-702 (1999), the Sixth Circuit reaffirmed its decision in *Frank's Nursery* that the EEOC is not bound by arbitration agreements to which it was not a party. Having thus twice held that the EEOC's ability to litigate and obtain relief is not limited by such arbitration agreements, it is unlikely that the Sixth Circuit would alter its position on the issue. Accordingly, the conflict in the circuits is likely to persist, and further review is therefore warranted to resolve it.

II. THE QUESTION PRESENTED IS AN IMPORTANT ONE

Respondent argues (Br. in Opp. 15) that the question presented in this case is "an infrequently arising anomaly unworthy of this Court's review." The record of litigation before the courts of appeals belies that characterization, in that four published decisions—*Kidder, Peabody, Frank's Nursery, Northwest Airlines*, and this case—in cases involving EEOC enforcement actions have addressed the question presented in the last two years. Respondent does not dispute that an increasing number of employers are considering requiring employees to agree to mandatory arbitration of employment-related (including equal opportunity) disputes. See Pet. 15. The question presented thus is arising frequently in the courts of appeals, and it can be expected to arise with increasing frequency in the future.

Respondent states correctly (Br. in Opp. 14-15) that EEOC brings only a relatively small proportion of the employment discrimination cases filed in federal court in a given year, and the only EEOC enforcement actions that are affected by the issue in this case are those in which the employee has entered into an arbitration agreement. Respondent mistakenly suggests, however, that as a result "there is no evidence that there is any meaningfully substantial number of cases in which the EEOC's ability to seek make-whole

relief on behalf of the individual employee was affected by an agreement to arbitrate entered into by the employee with his employer." Br. in Opp. 14.

Although the EEOC does not litigate a great many cases, the EEOC does take care to select the cases that it will litigate and to concentrate its limited resources on cases that raise important or novel legal issues or otherwise are of general importance. Indeed, as *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318 (1980), establishes, Congress intended the EEOC to serve precisely this role. See Pet. 13-14. Under the Fourth Circuit's rule, the EEOC may well find itself unable to bring precisely the issues and cases deserving of its litigation efforts to the courts, since a complaining party's entry into an arbitration agreement can, as a practical matter, preclude an EEOC action. In this case, for example, the Fourth Circuit suggested that the EEOC may be barred from seeking even purely equitable relief. See Pet. App. 18a n.8. Because the EEOC is able to bring only a relatively small number of cases, it is all the more critical that it not be barred from bringing the cases it identifies as most important. The Fourth Circuit's rule would prevent the EEOC from performing the role defined for it by Congress.

III. THE COURT MAY WISH TO HOLD THE PETITION PENDING ITS DECISION IN *CIRCUIT CITY STORES, INC.* V. *ADAMS*

In our petition, we stated that the Court may wish to hold this case pending its disposition of the petition for a writ of certiorari in *Circuit City Stores, Inc.* v. *Adams*, No. 99-1379. On May 22, 2000, the Court granted the petition in *Circuit City*, which presents the question whether contracts of employment are covered

by the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, at all. As we explained in the petition (at 20-21), the resolution of that question could affect both the legal analysis and practical significance of this case. Now that the Court has granted the petition for a writ of certiorari in *Circuit City* and will resolve the question presented in that case, we continue to believe that it may wish to hold this case until it has decided *Circuit City*. If the Court affirms in *Circuit City* (and thereby holds that contracts of employment are not covered by the Federal Arbitration Act), it may be appropriate to grant the petition, vacate the judgment, and remand this case to the court of appeals for reconsideration in light of the absence of any governing federal policy concerning arbitration in this context. If the Court reverses in *Circuit City* (and thereby holds that most contracts of employment are covered by the Federal Arbitration Act), the petition for a writ of certiorari in this case should be granted.

* * * * *

For the reasons given above and in the petition, the Court may wish to hold this case pending its decision in *Circuit City Stores, Inc.* v. *Adams*, No. 99-1379, and then dispose of it accordingly. Alternatively, the petition should be granted now.

Respectfully submitted.

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AUGUST 2000

Supreme Court, U.S.
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(16)

No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED: April 26, 2001

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 96-CV-2739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

DOCKET ENTRIES

DATE	DOCKET NUMBER	DOCKET ENTRY
9/9/96	1	COMPLAINT; with jury demand
		* * * * *
9/9/96	2	Answers to 16B Interrogatories by plaintiff EEOC
		* * * * *
9/9/96	4	AFFIDAVIT of David R. Treeter by plaintiff EEOC
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
12/2/96	10	MOTION by defendant Waffle House Inc to dismiss, and to compel arbitration and stay proceedings
12/2/96	11	MEMORANDUM by defendant Waffle House Inc in support of [10- 1] motion to dismiss
		* * * * *
12/22/96	13	MEMORANDUM by plaintiff EEOC in opposition to [10-1] motion to dismiss, [10-2] motion to compel arbitration and stay proceedings
12/22/96	14	AFFIDAVIT of Eric Scott Baker by plaintiff EEOC
12/22/96	15	AFFIDAVIT of Joseph P. Doherty by plaintiff EEOC
		* * * * *
1/13/97	20	REPLY by defendant Waffle House Inc to response to [10-1] motion to dismiss, [10-2] motion to compel arbitration and stay proceedings

DATE	DOCKET NUMBER	DOCKET ENTRY
2/18/97	21	Answers to 16B Interrogatories by defendant Waffle House Inc (ttil)
		* * * * *
5/9/97	23	REPORT AND RECOMMENDATIONS of Magistrate Judge Joseph R. McCrorey recommending that defendants motion to dismiss be denied and the petition to compel arbitration and stay proceedings be granted.
		* * * * *
5/23/97	24	OBJECTION by plaintiff EEOC to [23-1] report and recommendations
6/9/97	25	MEMORANDUM OF LAW by defendant Waffle House Inc in response to [24-1] objections to the magistrate's report and recommendation
6/19/97	26	SUPPLEMENTAL MEMORANDUM OF LAW by defendant Waffle House Inc to [24-1] objections to report and recommendation

DATE	DOCKET NUMBER	DOCKET ENTRY
3/23/98	27	ORDER denying [10-1] motion to dismiss, denying [10-2] motion to compel arbitration and stay proceedings
		* * * * *
3/31/98	29	NOTICE OF INTERLOCUTORY APPEAL by defendant Waffle House Inc from the order denying its motion to compel arbitration and for a stay under section 3 and 4 of the Federal Arbitration Act entered on March 24, 1998

* * * * *

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 98-1502

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INCORPORATED,
DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET ENTRY
4/7/98	Civil case docketed.
4/8/98	Docketing notice issued.
	* * * * *
3/1/99	Oral argument heard.
	* * * * *
10/6/99	Published, authored opinion filed.
10/6/99	Judgment order filed. Decision: affirmed in part, reversed in part and remanded. There is a dissenting opinion.

DATE	DOCKET ENTRY
	* * * * *
11/18/99	Petition filed by Appellee EEOC for rehearing.
	* * * * *
1/14/00	COURT ORDER filed denying motion for rehearing, denying motion for rehearing en banc.
	* * * * *
1/24/00	Mandate issued.

* * * * *

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 98-1502

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INCORPORATED, DEFENDANT-APPELLANT

Argued March 1, 1999
Decided Oct. 6, 1999

Before: NIEMEYER and KING, Circuit Judges, and LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Judge LEE joined. Judge KING wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

This appeal presents the question of first impression in this circuit whether and to what extent the Equal Employment Opportunity Commission ("EEOC"), in prosecuting a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer. Other circuits are split on the proper response to this question. Compare *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (holding that an arbitration agreement between a

charging party and an employer precludes the EEOC from seeking purely monetary relief in federal court on behalf of the charging party but not from seeking broad injunctive relief), with *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that a private arbitration agreement does not affect the scope of the EEOC's federal court suit at all).

Recognizing that the EEOC is vested with enforcement authority both to seek broad-based injunctive relief in the public interest and to seek "make-whole" relief on behalf of a charging party, we conclude (1) that the EEOC cannot be compelled, by reason of an arbitration agreement between the charging party and his employer, to arbitrate its claims, but (2) that, to the extent that the EEOC seeks to obtain "make-whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum. Accordingly, we affirm the district court's decision to deny Waffle House's petition to compel arbitration generally and remand to the district court for consideration of the EEOC's claims in light of this opinion.

I

On June 23, 1994, Eric Baker, who was seeking employment, entered the Waffle House facility located at exit 113 of Interstate 26 in Columbia, South Carolina, and proceeded to fill out and sign an application for employment with Waffle House, Inc. He left blank the space on the application asking what position he sought. The application included a provision requiring the applicant to submit to binding arbitration "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of

Waffle House, Inc., or the terms, conditions or benefits of such employment." Although the manager at that Waffle House facility, Lee Motlow, asked Baker whether he wanted the job there, Baker declined and instead, called the manager of a nearby Waffle House facility located at exit 110 of Interstate 26 in West Columbia, to whom Motlow had referred Baker.[1] The West Columbia Waffle House manager interviewed Baker and hired him to begin work two weeks later. Baker did not fill in another application and began work in the West Columbia facility on August 10, 1994, as a grill operator.

At his home, approximately two weeks later, Baker suffered a seizure, ostensibly caused by a change in the medication he was taking to control a seizure disorder that had developed as a result of a 1992 automobile accident. The next day, just after arriving for work, Baker suffered another seizure. Waffle House discharged Baker on September 5, 1994, stating in the separation notice that "We decided that for [Baker's] benefit and safety and Waffle House it would be best he not work any more."

Baker filed a charge with the EEOC, complaining that his discharge violated the Americans With Dis-

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[1] In its answers to interrogatories, the EEOC stated more particularly: "Shortly after he had spoken with Motlow, Baker called the Manager at the Waffle House to which Motlow had referred him. The Manager interviewed Baker and hired him to work in another nearby Waffle House, Unit # 446 in West Columbia. Baker visited Unit # 446 and spoke with the Manager, Mike Bradley. They agreed that Baker would start two weeks later." J.A. at 13.

abilities Act of 1990 ("ADA"), and on September 9, 1996, the EEOC filed this enforcement action in its own name against Waffle House pursuant to § 107(a) of the ADA, 42 U.S.C. § 12117(a), and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, alleging that Waffle House had engaged in "unlawful employment practices at its West Columbia, South Carolina, facility." The EEOC stated in its complaint that its purpose for filing the suit was "to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices." It sought as relief (1) a permanent injunction barring Waffle House from engaging in employment practices that discriminate on the basis of disability; (2) an order that Waffle House institute and carry out antidiscrimination policies, practices, and programs to create opportunities and to eradicate the effects of past and present discrimination on the basis of disability; (3) backpay and reinstatement for Baker; (4) compensation for pecuniary and non-pecuniary losses suffered by Baker; and (5) punitive damages.

In response to the complaint, Waffle House filed a petition under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to compel arbitration and to stay the litigation and, alternatively, to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). The motion was referred to a magistrate judge who—relying on the undisputed record consisting of the complaint, answers to interrogatories, and affidavits filed in connection with the motion to compel arbitration—recommended to the district court that it conclude that Baker had entered into an arbitration agreement with Waffle House and that the EEOC was required to arbitrate the claims it filed on behalf of Baker. The district court,

relying on the facts "extrapolated from the pleadings," disagreed with the magistrate judge's recommendations and denied each of Waffle House's motions, concluding that the arbitration provision contained in Baker's employment application was inapplicable because the West Columbia Waffle House facility, which ultimately hired Baker, had not hired him pursuant to his earlier application submitted at the Columbia Waffle House facility.

Waffle House filed this interlocutory appeal challenging the district court's denial of its petition to compel arbitration and to stay proceedings. *See* 9 U.S.C. § 16(a)(1). On appeal, it argues that (1) contrary to the district court's holding, a valid, enforceable arbitration agreement existed between Baker and Waffle House and (2) its motion to compel arbitration under § 4 of the FAA should be granted because the arbitration agreement between Baker and Waffle House binds the EEOC to "assert Baker's claim in an arbitral forum."

II

Because arbitration is a matter of contract, we must first determine whether an enforceable arbitration agreement governed Baker's employment with Waffle House. *See Johnson* v. *Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir. 1998). The district court concluded that the arbitration agreement in Baker's employment application did not govern his employment relationship with Waffle House because it was submitted to the Waffle House facility at exit 113 of Interstate 26 in Columbia, and Baker was not ultimately employed at that facility. When Baker later went to the Waffle House facility at exit 110 of Interstate 26 in West Columbia, he was given a job there without sub-

mitting another application. The court thus concluded, "it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate."

We disagree with the district court's analysis because it assumes that the two Waffle House facilities were legally distinct entities in this context. The employment application Baker completed was the standard form application for employment with the corporation Waffle House, Inc., and not with an individual Waffle House facility. Indeed, the manager at the Columbia Waffle House facility referred Baker to the manager at the West Columbia Waffle House facility. In filling out the application, Baker left blank the space provided on the form for listing specific positions applied for, and he specified no intent to limit the application to a particular location. Moreover, when Baker did begin work at the West Columbia facility, he did not fill out another application. It cannot be assumed that a national corporation like Waffle House hired an individual without gathering any of the requisite information, such as his proper name, address, social security number, age and other personal data, qualifications, and references, all of which were contained in the application Baker originally submitted at the Waffle House facility in Columbia.

Accordingly, the fact that Baker was ultimately employed at a different facility than the one at which he was physically present when he completed the application is immaterial to the applicability of the arbitration agreement. The generic, corporation-wide employment application completed and signed by Baker, and the

arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him. We thus conclude that Baker's application, when accepted by Waffle House, did form a binding arbitration agreement between Baker and Waffle House.

Having reached that conclusion, however, we must still determine what effect, if any, the binding arbitration agreement between Baker and Waffle House has on the EEOC, which filed this action in its own name both in the public interest and on behalf of Baker.

III

In its motion to compel arbitration, Waffle House sought "to enforce the arbitration agreement between Waffle House and Baker and compel the EEOC, on behalf of Baker, to submit Baker's employment related dispute with Waffle House to arbitration." On appeal, it continues to maintain that "[i]t is of no consequence under the FAA that the EEOC is bringing this action on behalf of Baker rather than Baker bringing this action directly" because the EEOC is "bound by Baker's arbitration agreement with Waffle House." The EEOC characterizes Waffle House's argument as "an astounding proposition." It argues that not only did it "never agree[ ] to arbitrate its statutory claim," but also that the EEOC "has independent statutory authority to bring suit in any federal district court where venue is proper." We agree with the EEOC.

In enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to "advance the public interest in preventing and remedying employment discrimination." *General Tel. Co. of the Northwest, Inc.* v. *EEOC*,

446 U.S. 318, 331, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980). The EEOC's independent authority to enforce the ADA is clear.

In enacting the ADA, Congress chose to incorporate the enforcement "powers, remedies, and procedures" of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (incorporating by reference 42 U.S.C. §§ 2000e-4, -5, -6, -8, -9). These Title VII mechanisms vest the EEOC with broad authority to enforce, in federal court, the statute's ban on disability-based discrimination. *See* 42 U.S.C. § 2000e-5(f)(1), (f)(3). Under Title VII as originally enacted, the EEOC's powers were limited to investigation and conciliation, and Congress relied exclusively on private parties' suits for enforcement. In 1972, however, seeking to remedy widespread noncompliance under this enforcement system, Congress amended Title VII, according the EEOC the right to file suit in federal court in its own name to eradicate discriminatory employment practices. *See General Tel.*, 446 U.S. at 325-26, 100 S. Ct. 1698. Although the amendments created a dual system of private and government enforcement, we have long recognized that "it was clear that Congress intended by these [1972] Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." *EEOC* v. *General Elec. Co.*, 532 F.2d 359, 373 (4th Cir. 1976) (internal quotation marks and citation omitted).

Because of this public mission, the EEOC cannot be viewed as merely an institutional surrogate for individual victims of discrimination. *See General Tel.*, 446 U.S. at 326, 100 S. Ct. 1698 (holding that "the EEOC's enforcement suits should not be considered representative actions subject to Rule 23"). "[U]nlike the individual charging party, the EEOC [sues] 'to vindicate the public interest' as expressed in the Congressional purpose of eliminating employment discrimination as a national evil rather than for the redress of the strictly private interests of the complaining party." *General Elec.*, 532 F.2d at 373 (quoting *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975)); *see also EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (concluding that because the EEOC's "interests are broader than those of the individuals injured by discrimination . . . private litigants cannot adequately represent the government's interest in enforcing the prohibitions of federal statutes" (citations omitted)); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (observing that "[p]rivate litigation in which the EEOC is not a party cannot preclude the EEOC from maintaining its own action because private litigants are not vested with the authority to represent the EEOC" (citations omitted)); *EEOC* v. *United Parcel Serv.*, 860 F.2d 372 (10th Cir. 1988); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987).

The statutory structure of Title VII's enforcement remedies (and therefore those of the ADA) reflects the notion that the scope of the public interest exceeds that of the individual's interest. In order to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact, a charging party "may not proceed to federal district court until . . . the EEOC has made its own determination as to the validity of complainant's claim and issued a right-to-sue letter." *Davis* v. *North*

Carolina Dep't of Correction, 48 F.3d 134, 138 (4th Cir. 1995). And if the EEOC chooses to file suit, the charging party may not bring his own suit; his right is then limited to intervening in the EEOC's suit. *See* 42 U.S.C. § 2000e-5(f)(1). In a similar vein, when a private individual brings suit, the court may, under certain circumstances, permit the EEOC to intervene to protect the national interest. *See id.* In addition, once the EEOC decides to sue in its own name, it is not limited to the facts presented in the charge. Rather, the EEOC may sue based on "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *General Tel.*, 446 U.S. at 331, 100 S.Ct. 1698; *see also General Elec.*, 532 F.2d at 370. Finally, the EEOC's independent interest is also reflected in the fact that a charging party may not withdraw his charge without the consent of the EEOC. *See* 29 C.F.R. § 1601.10.

Even while empowering the EEOC to sue on a charge independently, Congress preserved the individual's private remedies under Title VII, indicating that private suits are still appropriate to redress individuals' grievances. And even when the EEOC has determined to bring suit in its own name, the charging party retains "the right to intervene in a civil action brought by the Commission" if the individual believes that the EEOC will not adequately represent his interests as it pursues its public objectives. *See* 42 U.S.C. § 2000e-5(f)(1); *compare* 29 U.S.C. § 626(c)(1) (terminating an individual's right to sue under the ADEA upon the EEOC's commencement of an action to enforce that individual's

rights).[2] Congress anticipated that the EEOC would not always be able to achieve the best possible result for each individual while at the same time pursuing its mission to vindicate the public interest. *See General Tel.*, 446 U.S. at 331, 100 S. Ct. 1698 (noting that the EEOC "is authorized to . . . obtain the most satisfactory overall relief even though competing interests are involved" and that it must make "the hard choices where conflicts of interest exist").

In short, under the 1972 amendments to Title VII, which are incorporated into the ADA, Congress has created a dual enforcement system, reflecting the notion that the EEOC and the charging party are not interchangeable plaintiffs. Each has its own distinct, albeit overlapping, interests for which overlapping remedies are provided. Thus, in pursuing the inquiry into whether the EEOC can be compelled to arbitrate on the basis of an arbitration agreement binding the charging party, we do not take the EEOC as a surrogate for the charging party, subrogated to his interest. Rather, we examine the related, but independent, interests of both the EEOC and the charging party to determine how an arbitration agreement signed by the charging party affects the prosecution of a claim by the EEOC.

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[2] In concluding that this "distinctive enforcement scheme of the ADEA" illustrates the EEOC's "representative responsibilities when it initiates litigation to enforce an employee's rights," the Third Circuit expressly noted that the enforcement scheme of Title VII "from which the framers of the ADEA consciously departed . . . has no similar feature." *U.S. Steel*, 921 F.2d at 494 & n.4.

First, we must recognize that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate. On the contrary, as demonstrated above, the 1972 amendments to Title VII clearly show that Congress intended that the EEOC vindicate the public interest by conciliation and then by suit in federal court. We must also recognize that in this case the EEOC is not a party to any arbitration agreement. *See AT & T Technologies, Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986); *Arrants* v. *Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (explaining that "[e]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate" (citation omitted)). Thus, the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest. This argument, however, disregards the EEOC's independent statutory role as we have outlined it.

In addition, contrary to Waffle House's claims, neither of the other two circuits that have addressed the question of the impact of a private arbitration agreement on the EEOC's ability to sue in its own name have concluded that such an agreement permits a court to force the EEOC into arbitration under the FAA. *See Frank's Nursery*, 177 F.3d at 462 (observing that "courts may not treat the agreement of a private party to arbitrate her action as the agreement of the EEOC to arbitrate its action"); *Kidder, Peabody*, 156 F.3d at 301-02 (upholding the district court's grant of the employer's motion to dismiss the EEOC's ADEA suit seeking solely monetary damages but not addressing the issue of compelling the EEOC to arbitrate because the employer did not seek to do so).

Moreover, the Supreme Court has recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991) (holding that an employee's private arbitration agreement with her employer precluded *her* from filing suit against the employer under the ADEA). Although a private arbitration agreement does bar an individual ADEA claimant from asserting her claim in court, it does *not* prevent her from filing a charge with the EEOC. *See id.* at 28, 111 S. Ct. 1647. This rule demonstrates the Court's recognition that the EEOC's suit can accomplish aims—namely, combating discrimination on a societal level—that an individual's suit is not equipped, nor perhaps intended, to accomplish. The court also emphasized, in refuting the argument that enforcing arbitration agreements would undercut the statutory scheme, that "it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief." *Id.* at 32, 111 S. Ct. 1647. Thus, it is apparent that the Court did not intend that when an individual who is subject to an arbitration agreement files a charge, the EEOC can only pursue relief in an arbitral forum. To the contrary, the Court appears to have contemplated that arbitration agreements between charging parties and their employers would not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws *in court*.

Accordingly, we conclude that Waffle House cannot succeed on its motion to compel the EEOC to arbitrate.

IV

While we have thus observed that the important role of the EEOC in vindicating the public interest in preventing and eradicating workplace discrimination is not to be restricted by arbitration agreements to which it is not a party, its role in vindicating in federal court the individual interests of the charging party implicates the competing federal policy favoring the enforcement of arbitration agreements.

When an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to give that contract effect in order to favor the arbitration mechanism for dispute resolution. *See* 9 U.S.C. § 2; *Moses H. Cone Mem'l. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). To permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong policy favoring arbitration. Because Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself. The EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, *see Gilmer*, 500 U.S. at 28, 111 S. Ct. 1647, but, as we conclude herein, it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims. Although the EEOC acts in the public interest, even when enforcing only the charging party's claim, *cf. Albemarle Paper Co.* v.

Moody, 422 U.S. 405, 417-18, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975), the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief to attack discrimination more generally.

Recognizing these competing policies, we agree with the balance struck by the Second Circuit, which held that although the EEOC "may seek injunctive relief in the federal forum for employees even when those employees have entered into binding arbitration agreements," it may not pursue relief in court—in that case, monetary relief—specific to individuals who have waived their right to a judicial forum by signing an arbitration agreement. *Kidder, Peabody*, 156 F.3d at 302-03; *but see Frank's Nursery*, 177 F.3d at 459-67 (holding that neither the FAA nor principles of preclusion or waiver could operate to bar the EEOC from seeking monetary relief on behalf of aggrieved individuals). When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

Thus, we hold that to the extent that the EEOC seeks "a permanent injunction enjoining [Waffle House] from discharging individuals and engaging in any other employment practice which discriminates on the basis

of disability" and an order to Waffle House "to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices," the EEOC is pursuing the public interest in a discrimination-free workplace, and it must be allowed to do so in federal court, as authorized by the ADA, notwithstanding the charging party's agreement to arbitrate. In seeking to "vindicate rights belonging to the United States as sovereign," *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (internal quotation marks and citation omitted), which are not necessarily identical to the interests of the individual charging party, the EEOC's course of conduct should not be affected by the actions of an individual in entering into a private arbitration agreement. *See* Part III, *supra*. In similar contexts where charging parties have been deprived of their right to sue either by settling their claims or having their claims dismissed, courts have nevertheless permitted the EEOC to maintain a suit for injunctive relief. *See, e.g.*, *EEOC* v. *Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (noting that "there would be little point in [the EEOC] having the independent power to sue if it could not obtain relief beyond that fashioned for the individual claimant"); *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291-92 (7th Cir. 1993); *Goodyear Aerospace*, 813 F.2d at 1542-45.

Conversely, however, in these same contexts some of the same courts have recognized that a charging party's actions that impede his own right to sue *can* also circumscribe the contours of the EEOC's suit in its own name to the extent that it acts on behalf of the charging

party. *See, e.g.*, *Goodyear Aerospace*, 813 F.2d at 1543 (holding that the charging party's acceptance of a personal settlement of her claims rendered moot the EEOC's claims for backpay on her behalf); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (holding that the doctrine of *res judicata* barred the EEOC from seeking "individualized benefits" under the ADEA on behalf of individuals whose own suits were unsuccessful because the EEOC was "in privity" with those individuals); *Harris Chernin*, 10 F.3d at 1291 (following *U.S. Steel's* reasoning with regard to the EEOC's claim for backpay, liquidated damages, and reinstatement for an individual whose suit was dismissed as barred by the statute of limitations).

Similarly, we also hold that when the EEOC enforces the individual rights of Baker by seeking backpay, reinstatement, and compensatory and punitive damages, it must recognize Baker's prior agreement to adjudicate those rights in the arbitral forum. Because the EEOC maintains that it "has no intention" of pursuing a claim in arbitration, we do not reach the question of whether the EEOC is *authorized* to do so. But it cannot pursue Baker's individual remedies in court, although it may seek broad injunctive relief in its public enforcement role.

Accordingly, we affirm the district court's order to the extent that it denied Waffle House's motions to compel the EEOC to arbitrate and to dismiss this action. We reverse its ruling that the EEOC may prosecute Baker's individual claims in court. And we remand with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted

on behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief.[3]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

KING, Circuit Judge, dissenting:

Because I agree with the district court that there was no agreement to arbitrate in this case, I must respectfully dissent. I would, therefore, without reaching the issue of the authority of the EEOC to seek injunctive and "make-whole" relief for Mr. Baker on his ADA claim, simply affirm the decision of the district court.

I.

On June 23, 1994, Mr. Baker completed an employment application at a Waffle House restaurant in Columbia, South Carolina ("Columbia Waffle House" or "CWH").[1] The district court found that the manager of

[3] Waffle House argues that the EEOC is not entitled to broad injunctive relief because its claim relies exclusively on the incident involving Baker. We leave to the district court the question of whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks. *See* 42 U.S.C. § 2000e-5(g)(1).

[1] The employment application completed by Mr. Baker contains a mandatory arbitration provision, which is comprised of four lines of single-spaced text located at the bottom of the first page of a two-page application. It states in full:

> The parties agree that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

This provision, printed in seven-point font, occupies merely 5/16 of an inch of a page that is eleven inches long. No other clause in the employment application is printed in as small a font size.

the CWH offered Mr. Baker a job on that occasion, which Mr. Baker did not accept.

Approximately three weeks later, Mr. Baker traveled to a different Waffle House restaurant, one located in West Columbia, South Carolina ("West Columbia Waffle House" or "WCWH"), where, the district court found, Mr. Baker "orally applied for a job and was orally given a job which he accepted." J.A. 137. Mr. Baker did not execute a written employment application at the WCWH. Indeed, there is no evidence that the terms of the employment application that Mr. Baker completed at the CWH were discussed or adopted by Mr. Baker and Mike Bradley, the WCWH manager who hired Mr. Baker. Since there was no evidence on the point, the district court found that it did not appear that the "management [of WCWH] knew of or had the benefit of the application form which Baker had previously signed." J.A. 137-38.

The district court made no findings connecting the WCWH offer to the CWH offer that Baker had rejected.[2] Further, the district court's affirmative rejection of the magistrate judge's findings, *see supra* note 2, is, in itself, a factual finding that requires our deference. The district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside [on appeal] unless clearly erroneous." Fed.R.Civ.P. 52(a). Findings of fact may be overturned only if we are "left with the definite and firm conviction

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[2] In its written opinion of March 20, 1998, from which this appeal is taken, the district court found and concluded as follows:

> [T]his Court *sua sponte* inquired concerning the existence of evidence that Baker and Waffle House made an agreement to arbitrate with respect to the job he accepted. The facts stated by the Magistrate Judge which are extrapolated from the pleadings do not suggest that an employment agreement came into being following Baker's signing of the application form on June 23, 1994. Baker left the Columbia Waffle House without accepting employment. It does not appear from the statement of facts relied upon by the Magistrate Judge that when Baker went to the West Columbia, South Carolina Waffle House, the management there knew of or had the benefit of the application form which Baker had previously signed. Instead, it appears that Baker orally applied for and was orally given a job which he accepted. That being the case, it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate. For that reason, I am unable to agree with that portion of the Magistrate Judge's conclusions.

J.A. 137-38. Significantly, the district court expressly rejected the magistrate judge's conclusion that Baker "appear[ed] to have assented to be bound by the prior agreement, that if employed he would submit his claim to arbitration," by Baker's subsequent acceptance of employment at the WCWH.

that a mistake has been committed." *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985).[3] The majority wrongly implies that an appellate court may consider and adopt facts found by a magistrate judge—facts already expressly rejected by the district court—without finding such facts to be clearly erroneous.[4]

Based on its factual findings, the district court concluded that Mr. Baker and Waffle House had not made an agreement to arbitrate with respect to the job that he ultimately accepted—the position of grill operator at the West Columbia Waffle House. Consequently, the district court denied Waffle House's motion to compel arbitration and its motion to dismiss.

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[3] *See also* Fed.R.Civ.P. 52 advisory committee's note (1985) (public interest recognizes the trial court, not the appellate tribunal, as the fact-finder, to promote stability and judicial economy). When a court of appeals actively engages in the fact-finding function, it undermines the legitimacy of the district courts. *Id.*

[4] While the majority asserts that the EEOC interrogatory answers support its factual scenario, *see ante* p. [3a] note 1, these answers are legally irrelevant for at least three reasons: (1) they are invalid because they were not made under oath (as required by Rule 33(b) of the Federal Rules of Civil Procedure); (2) they are signed by counsel only (not by Baker, who had the requisite personal knowledge); and (3) their evidentiary value was repudiated by the EEOC at oral argument. *Bracey* v. *Grenoble*, 494 F.2d 566, 570 n. 7 (3rd Cir. 1974). Accordingly, these answers could not and cannot be properly relied on in this case. *See id.* Most importantly, subsequently filed affidavits (properly sworn) do not contain the information relied upon by the majority, *see* J.A. 12, 28, and that information is contrary to the findings of the district court. *See supra* note 2. As I have noted, the majority has not determined the factual findings of the district court to be clearly erroneous.

The district court's findings of fact are not clearly erroneous, and its conclusion that there was no agreement to arbitrate follows perforce from its findings. Accordingly, I would affirm the district court's order denying Waffle House's motions to dismiss and compel arbitration, thereby enabling the EEOC to pursue injunctive and "make-whole" relief on behalf of Mr. Baker.

II.

A.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, which governs here, represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Where there is a valid agreement to arbitrate that covers the matter in dispute, the FAA requires federal courts to stay any ongoing judicial proceedings and compel arbitration. *See Hooters of Am., Inc.* v. *Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (citing the FAA, 9 U.S.C. §§ 3, 4).

But the mandate and policy concerns of the FAA come into play only if the claims at issue are arbitrable in the first instance, and if there is a valid agreement to arbitrate. *See Phillips*, 173 F.3d at 937-38. This court has held that a claim such as Baker's is arbitrable; the ADA does not prohibit arbitration of a claim arising under that statute. *See Austin* v. *Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) ("The language of the [ADA] could not be any more clear in showing Congressional favor towards arbitration."); *see also Phillips*, 173 F.3d at 937. However, the question remains whether Mr. Baker and Waffle House

entered into an agreement to arbitrate that would require Mr. Baker to arbitrate any ADA claim arising from his employment at the WCWH.

Whether a contract to arbitrate exists is "an issue for judicial determination to be decided as a matter of contract." *Johnson* v. *Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998) (citing *AT & T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)). In deciding this issue, we should apply "ordinary state-law principles that govern the formation of contracts." *Johnson*, 148 F.3d at 377 (quoting *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)).

South Carolina law supports the district court's conclusion here. In recognition of the fact that Mr. Baker did not accept the offer of employment at the CWH, the district court held that "no employment agreement came into being following Baker's signing of the application form on June 23, 1994." The formation of contracts under South Carolina law "is governed by well-settled principles." *Carolina Amusement Co.* v. *Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122, 125 (1993).

> Quite simply, [a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

Id. (internal citations and quotation marks omitted).

When the manager at the Columbia Waffle House offered Mr. Baker a job, the terms of *that* offer included the provisions of the employment application, which Mr. Baker had completed in the restaurant on June 23, 1994, while the restaurant manager was sitting next to him. Those terms were part of the "bargained-for exchange" offered by the manager of the CWH.[5] "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981); *see also Prescott* v. *Farmers Tel. Coop.*, 335 S. C. 330, 516 S.E.2d 923, 926 (1999). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement*, 437 S.E.2d at 125 (citations omitted). Without an acceptance of an offer, there can be no contract. *Id.*; *see also* Restatement (Second) of Contracts § 35 cmt. c.

Because Mr. Baker declined to accept the job offered on June 23, 1994, by the manager of the CWH, no employment agreement was formed. *Id.* Under settled legal principles, the terms of the rejected offer,

[5] Indeed, at the top of the application in large, bold, capital letters, Waffle House states the following requirement:

MUST BE COMPLETED IN THE RESTAURANT

J.A. 26. The choice of the definite article "the" is telling. Which restaurant must the application form be completed in? The answer is obvious—*the* Waffle House restaurant to which the job applicant is applying.

In Mr. Baker's case, he did just what the form required—he completed the employment application in the Columbia Waffle House—the restaurant to which he was applying when he filled out the application.

including the provisions of the employment application, did not survive the rejection of the offer. Mr. Baker's power of acceptance of *that* offer was terminated by his rejection of it. *See* Restatement (Second) of Contracts §§ 36, 38 (when offeree rejects offer, his power of acceptance is terminated).

When Mr. Baker, three weeks later, traveled to the West Columbia Waffle House and orally applied for a job there, its manager, Mr. Bradley, made Mr. Baker an offer for a job as a grill operator at $5.50 an hour. Mr. Baker accepted Mr. Bradley's offer on the spot. There is no evidence that the provisions of the June 23, 1994 employment application were adopted, or even discussed, as part of the employment agreement that came into being three weeks later at the West Columbia Waffle House. *See Player* v. *Chandler*, 299 S.C. 101, 382 S.E.2d 891, 893 (1989) (a valid and enforceable contract requires "a meeting of the minds between the parties with regard to the essential and material terms of the agreement"). Thus, there is no basis for the majority's conclusion that Mr. Baker agreed to arbitrate claims arising from his employment at the West Columbia Waffle House.[6]

B.

In its opinion, the majority simply relies on its own assumptions about corporate practices, as if those are somehow dispositive of the question whether an agree-

[6] It is undisputed that when Mr. Baker spoke with Mr. Bradley about a job at the WCWH, Mr. Bradley mentioned neither arbitration nor anything else about the way disputes were settled between Waffle House and its employees.

ment to arbitrate has been formed, while ignoring the district court's factual findings.[7] The majority's holding—that the "generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him," *ante* at [7a]—creates an unprecedented rule that has disturbing implications beyond the injustice done to Mr. Baker.

Under the rule the majority creates today, the terms contained in an employment application submitted to one facility in a restaurant chain, or any other business chain, become binding on the job applicant if she is subsequently hired by another facility in the same chain. In effect, the terms contained in the employment application, including the mandatory arbitration provision, become free-floating, ready to bind the unsuspecting job applicant whenever and wherever she might obtain employment with the same chain. It is not surprising that the majority fails to cite any authority to support its conclusion. As explained above, the majority's holding is untenable under fundamental

[7] Indeed, the majority substitutes its assumptions for the district court's findings, and fails to review or analyze the district court's findings for clear error. *See* Section I.

principles of contract law.[8]

[8] In addition, I believe that even under the majority's theory—that the employment application "followed" Mr. Baker to the West Columbia Waffle House—the arbitration provision would be unenforceable.

First, the arbitration provision mandates that the employee pay one-half of the costs and expenses of arbitration, *see supra* note 1 ("The costs and expenses of the arbitration shall be borne evenly by the parties"). At least three of our sister circuits have held that a mandatory arbitration agreement that requires an employee to pay a portion of the arbitrator's fees is unenforceable under the Federal Arbitration Act. *See Shankle* v. *B-G Maintenance Mgmt. of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). These courts reasoned that if an employer requires an employee to agree to mandatory arbitration as a condition to obtaining or continuing employment, thereby prohibiting the employee from using the judicial forum to vindicate his rights, then the employer must provide an accessible alternative forum. *See, e.g., Shankle*, 163 F.3d at 1235. If an arbitration agreement requires the employee to pay a portion of the arbitrators' fees—which often may amount to thousands of dollars—an accessible forum is, in effect, unavailable, because of the disincentive to arbitrate created by such fees. *Id.* Under these circumstances, an employee like Mr. Baker is unlikely to pursue his statutory claims. *See Cole*, 105 F.3d at 1484 (noting that arbitration fees "are unlike anything that [employee] would have to pay to pursue his statutory claims in court"). As the Tenth Circuit reasoned, "[s]uch a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws." *Shankle*, 163 F.3d at 1235 (citations omitted).

Second, the mandatory arbitration provision would be unenforceable because it is so inconspicuous that it failed, as a matter of law, to provide Mr. Baker with sufficient notice that he was waiving his right to a judicial forum for his statutory claims. *See Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20-21 (1st Cir. 1999). In *Rosenberg*, the First Circuit inter-

The majority's rule has no temporal or geographical limits. For example, suppose a student submits an employment application to a McDonald's in North Carolina, and is offered but declines a position there. Then, months or years later, she seeks and obtains employment at a McDonald's in Maryland without submitting another written employment application. Under the majority's rule, she would be bound by the terms of the employment application submitted earlier in North Carolina.

Moreover, if a job applicant wishes to escape the stranglehold of the "generic, corporation-wide employment application," he must specify *his* "intent to limit the application to a particular location." *Ante* at [6a-7a]. The Waffle House application, however, does not request the applicant to specify which Waffle House locations he is applying for. And the application form itself clearly assumes that the job seeker is applying for a position at *the* restaurant where he obtained and completed the application. Yet the majority would nonetheless require the job applicant—rather than the corporation that drafted the terms of the employment application—to specify his intent, which is not asked for, to limit the application to a particular location. To

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preted the Supreme Court's decision in *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L.Ed.2d 361 (1998), and a provision of the 1991 Civil Rights Act (which is also included in the ADA), as requiring that "there be some minimum level of notice to the employee [who is a party to a private arbitration agreement] that statutory claims are subject to arbitration". *Rosenberg*, 170 F.3d at 20-21. With its buried arbitration provision, Waffle House failed, as a matter of law, to provide such "minimum level of notice" to Mr. Baker that he was required to arbitrate his ADA claim. *See Rosenberg*, 170 F.3d at 20.

place such a duty on job applicants is patently unfair and unwarranted.

Common sense tells us that a person who physically goes to the Wal-Mart in Lewisburg, West Virginia, is applying for a job at *that* Wal-Mart, not one in Richmond, Virginia, or Charlotte, North Carolina, absent express negotiations to the contrary. He would not reasonably expect that the employment application submitted to the Lewisburg Wal-Mart would be considered an application to work in Richmond or Charlotte. The majority sets a trap for the unwary job applicant by the counterintuitive rule that it has created today.

III.

Because I agree with the district court that there was no agreement to arbitrate between Waffle House and Mr. Baker, I would affirm its ruling and permit the EEOC to pursue both injunctive and "make-whole" relief on behalf of Mr. Baker.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3 96 2739 10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Sept. 9, 1996]

COMPLAINT

JURY TRIAL DEMAND

NATURE OF THE ACTION

This is an action under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices. As alleged with greater particularity in paragraph 8 below, Eric Scott Baker, a qualified individual with a disability, was discharged by Waffle House, Inc., because of his disability.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(f)(1) and (3) and pursuant to Section 102 of the Civil Rights Act of 1991. 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the District of South Carolina, Columbia Division.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of Title I of the ADA and is expressly authorized to bring this action by Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times, Defendant, Waffle House, Inc. (the "Employer"), has continuously been a Georgia Corporation doing business in the State of South Carolina and the City of West Columbia, and has continuously had at least 15 employees.

5. At all relevant times, Defendant Employer has continuously been an employer engaged in an industry affecting commerce under Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000e-(b), (g) and (h).

6. At all relevant times, Defendant Employer has been a covered entity under Section 101(2) of the ADA, 42 U.S.C. § 12111(2).

STATEMENT OF CLAIMS

7. More than days prior to the institution of this lawsuit, Eric Scott Baker filed a charge with the Commission alleging violations of the ADA by Defendant Employer. All conditions precedent to the institution of this lawsuit have been fulfilled.

8. On or about September 5, 1994, Defendant Employer engaged in unlawful employment practices at its West Columbia, South Carolina facility, in violation of Section 102(a) of the ADA, 42 U.S.C. § 12112(a). The practices included discharging Eric Scott Baker, a qualified individual with a disability (seizure disorder), from his position as a cook because of his disability.

9. The effect of the practice complained of in paragraph 8 above has been to deprive Eric Scott Baker of equal employment opportunities and otherwise adversely affect his status as an employee because of his disability.

10. The unlawful employment practice complained of in paragraph 8 above was intentional.

11. The unlawful employment practice complained of in paragraph 8 above was done with malice or with

reckless indifference to the federally protected rights of Eric Scott Baker.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Employer, its officers, successors, assigns, and all persons in active concert or participation with it, from discharging individuals and engaging in any other employment practice which discriminates on the basis of disability.

B. Order Defendant Employer to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant Employer to make whole Eric Scott Baker, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to rightful-place reinstatement.

D. Order Defendant Employer to make whole Eric Scott Baker by providing compensation for past and future pecuniary losses resulting from the unlawful employment practice described in paragraph 8 above, including but not limited to job search expenses and medical expenses, in amounts to be determined at trial.

E. Order Defendant Employer to make whole Eric Scott Baker by providing compensation for past and

future nonpecuniary losses resulting from the unlawful practice complained of in paragraph 8 above, including but not limited to emotional pain, suffering, inconvenience and humiliation, in amounts to be determined at trial.

F. Order Defendant Employer to pay Eric Scott Baker punitive damages for its malicious and reckless conduct, as described in paragraph 8 above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

C. GREGORY STEWART
General Counsel

ROSALIND GRAY
Deputy General Counsel

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1801 "L" Street, N.W.
Washington, D.C. 20507

/s/ MINDY E. WEINSTEIN
MINDY E. WEINSTEIN
Regional Attorney

/s/ ROSEMARY J. FOX
ROSEMARY J. FOX
Supervisory Trial Attorney

/s/ DAVID R. TREETER
DAVID R. TREETER
Senior Trial Attorney

EQUAL EMPLOYMENT
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129 West Trade Street
Suite 400
Charlotte, NC 28202
(704) 344-6886

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3 96 2739 10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Sept. 9, 1996]

PLAINTIFF'S RESPONSES TO STANDARD INTERROGATORIES AND STANDARD DIRECTIVES TO PRODUCE IN COMPLIANCE WITH LOCAL RULE 7.04

Plaintiff, Equal Employment Opportunity Commission (the "Commission"), files the following responses to standard interrogatories and directives to produce in compliance with Rule 7.04 of the Local Rules of Practice for the United States District Court for the District of South Carolina (hereafter "Local Rules").

RESPONSES

1. Furnish a detailed factual basis for each claim you assert. If a contract, writing or document forms the basis of any claim, quote or attach the relevant portions, state your construction thereof and the claimed breach or wrongful conduct in connection therewith.

RESPONSE: Eric Baker is a twenty-one year old male resident of Gaston, South Carolina. Baker was involved in an automobile accident in 1992. As a result of the accident, Baker now has a disability, a seizure disorder. Although his seizures are controlled by the medication Depakote, he may still infrequently experience a seizure. He has certain physical symptoms prior to having a seizure which prepare him for the possibility of the seizure, and he seeks out a place to await the seizure.

In July of 1994, Baker was asked by Lee Motlow, the District Manager for Waffle House, whether he wanted a job. Baker told Motlow about his seizures. Motlow assured Baker that there was no problem.

Shortly after he had spoken with Motlow, Baker called the Manager at the Waffle House to which Motlow has referred him. The Manager interviewed Baker and hired him to work in another nearby Waffle House, Unit #446 in West Columbia. Baker visited Unit #446 and spoke with the Manager, Mike Bradley. They agreed that Baker would start two weeks later. During this conversation, Baker told Bradley that he suffered from seizures.

Baker started work at Waffle House on August 10, 1994. Baker's job was to prepare food orders for customers and prepare food for later use. The Grill Operators normally work seven to eight hours per day and use the grill, toasters, waffle irons, a two isle burner, knives and other utensils.

On or about August 25, Baker suffered a seizure at home. The seizure was caused by a change in Baker's

medication. Baker called Bradley who told him to stay home and come to work the next day.

On or about August 26, a Friday, Baker went to work for his scheduled shift. Baker was to begin work at 8:00 a.m. At about 7:50 a.m., just prior to clocking in, Baker felt as though he was going to have a seizure. He went into the back room of the restaurant and sat down. Tonya Pridgen called Baker's parents to inform them of the situation. The parents came to the restaurant. Shortly after they arrived, Baker began to have the seizure. It lasted about thirty seconds. Afterward, Baker went home for the day.

Baker called his workplace that evening and spoke with the Relief Manager, Violet Sharpe. Sharpe told him to call back the next day to speak with Bradley. When Baker called the next day, Sharpe told him that Bradley was on vacation and that Bradley had told her that Baker could not return to work until he returned from vacation.

Baker spoke with Bradley on or about the afternoon of September 3, 1994. Baker told Bradley that he felt fine and wanted to return to work. Bradley told Baker that they needed to talk about it and asked Baker to come to the restaurant on the next morning.

Baker went to the Waffle House on or about September 4, 1995. He was accompanied by his parents. Baker went into the back of the restaurant with Bradley to discuss the situation. Bradley asked Baker how he felt. Baker replied that he was fine and asked when he could return to work. Bradley stated he could not let him return to work because of the seizures. When asked

the reason, Bradley, stated: "We can't have you spazzing out around the customers because it looks bad."

On or about September 12 or 13, Baker telephoned Motlow and discussed his discharge. Motlow stated that Baker should have never been told it would not be a problem to work at Waffle House with the seizures and that Baker should have never been hired.

Waffle House provided a Separation Notice to Baker. The notice stated the following as the reason for Baker's separation from employment:

> Scott was Hired As a Grill operator, Where he Was Involved With Grease & a Hot Flame. On 8/26/94 Scott Experenced (sic) A Seizure On both Days. We Were Told It Was Due to A change in medication. We Decided that For his Benefit & *Safety* at Waffle House It Would Be Best he not Work Any more.

2. Describe, by name and citation or other generally recognized identification, decisions, statutes, ordinances, acts, codes, regulations, legal principles, standards, and customs or usages, which you contend are especially applicable to this action. State which jurisdiction's law applies to each claim and why.

RESPONSE: Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(f)(1) and (3), and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The

ADA prohibits an employer from discharging an employee because of the employee's disability. 42 U.S.C. § 12112(a).

Applicable to this action are the following decisions: *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995); *Tyndall v. National Education Centers*, 31 F.3d 209 (4th Cir. 1994); and *Sarrsycki v. United Parcel Service*, 862 F.Supp. 336 (W.D. Okla. 1994).

3. State the full names, addresses, and telephone numbers of all lay witnesses whose testimony you may use at the trial of this case and describe the special factual issues to which that testimony is expected to relate.

RESPONSE: The lay witnesses currently known to the Commission whose testimony may be used at trial include:

1. Eric Scott Baker
   106 Oakdale Street
   Gaston, S.C. 29053
   Telephone: 803/926-8652

   The Commission expects Eric Scott Baker to testify regarding his employment and subsequent discharge from Defendant. He will also testify regarding his medical condition and the harm he has suffered as a result of the discharge.

2. Sylvia Baker
   106 Oakdale Street
   Gaston, S.C. 29053
   Telephone: 803/926-8652

   Sylvia Baker is Eric Scott Baker's mother. The Commission expects Sylvia Baker to testify regarding the events occurring on August 26, 1994 at Defendant's West Columbia facility. Sylvia Baker will also testify regarding her son's medical condition and the harm suffered by her son as a result of his discharge by Defendant.

3. Robert G. Baker
   106 Oakdale Street
   Gaston, S.C. 29053
   Telephone: 803/926-8652

   Robert G. Baker is Eric Scott Baker's father. The Commission expects Robert G. Baker to testify regarding the events occurring on August 26, 1994 at Defendant's West Columbia facility. Robert G. Baker will also testify regarding his son's medical condition and the harm suffered by his son as a result of his discharge by Defendant.

4. Michael Bradley
   c/o Waffle House, Inc.
   P.O. Box 6450
   Norcross, GA 30091-6450
   Telephone: 404/729-5700

   The Commission expects Michael Bradley to testify regarding Eric Scott Baker's employment with Defendant, including matters regarding Baker's discharge.

5. Violet Sharpe
c/o Waffle House, Inc.
P.O. Box 6450
Norcross, GA 30091-6450
Telephone: 404/729-5700

The Commission expects Violet Sharpe to testify regarding Eric Scott Baker's employment with Defendant, including matters regarding Baker's discharge and Baker's attempt to come back to work after he suffered a seizure.

6. Lee Motlow
c/o Waffle House, Inc.
P.O. Box 6450
Norcross, GA 30091-6450
Telephone: 404/729-5700

The Commission expects Lee Motlow to testify regarding Eric Scott Baker's employment with Defendant, including his hiring and his discharge.

7. Tonya Pridgen
116 S. Carlyle St.
Gaston, SC 29053
Telephone: 803/796-7460

The Commission expects Tonya Pridgen to testify regarding Baker's employment with Defendant. Tonya Pridgen will also testify regarding conversations between Eric Scott Baker and Michael Bradley, to the extent that she was a part of those conversations.

8. Lawson Pridgen
Address unknown.

The Commission expects Lawson Pridgen to testify regarding Baker's employment with Defendant. Lawson Pridgen will also testify regarding conversations between Eric Scott Baker and Michael Bradley, to the extent that she was a part of those conversations.

9. Mary Moore
Paralegal Specialist
U.S. Equal Employment Opportunity Commission
129 West Trade Street, Suite 400
Charlotte, N.C. 28202
Telephone: 704/344-6682

The Commission expects Ms. Moore to testify regarding calculation of lost wages and benefits of Eric Scott Baker as a result of his discharge by Defendant.

10. Designated Custodian of Records for
S.C. Human Affairs Commission
2611 Forest Drive, Suite 200
Columbia, S.C. 29240
Telephone: 803/253-6336

11. Designated custodian of records for
the Charlotte District Office of the
U.S. Equal Employment Opportunity Commission
129 West Trade Street, Suite 400
Charlotte, N.C. 28202
Telephone: 704/344-6682

The custodians of records to be designated by the Commission and by the S.C. Human Affairs Commission are expected to testify regarding documents generated and obtained during the investigation of Mr. Baker's charge of employment discrimination.

The Commission reserved the right to supplement and/or amend this list of potential lay witnesses and the designations of the subject matter on which each witness may testify in accordance with the Local Rules of this district and the Federal Rules of Civil Procedure.

4. Identify by full name, address and telephone number each person whom you expect to call as an expert witness at the trial of this case, and, as to each expert so identified, state the subject matter on which he is expected to testify, the substance of the facts and opinions to which he is expected to testify, and a summary of the grounds for each opinion.

RESPONSE: Although it is anticipated that Baker's personal physician may testify as to matters related to seizure disorders and Baker's condition, no expert witnesses have been identified by the Commission at this time. This response will be supplemented as required by the Local Rules and the Federal Rules of Civil Procedure.

5. If you contend that you have been injured or damaged, describe said injuries, damages and method of computation in detail, including but not necessarily limited to: the nature of the injury or damage; claimant's life expectancy; medical, nursing, hospital and similar expenses and the names of persons and institutions and the amount paid to and owing each; the

cost of repairs to property and names of persons making them or, if incapable of repair, the value of the property immediately before the damage and immediately afterwards; the amount of lost earnings or profits; the period for which loss is claimed, and the name of employer if applicable; the age, employment, earnings, marital status, and life expectancy of the deceased and the names, ages, and the relationship of each statutory beneficiary.

RESPONSE: The Commission brings this action on behalf of Eric Scott Baker. Based on the information currently available to the Commission, the Commission will seek damages for Mr. Baker as follows:

a. back pay in an amount sufficient to compensate Mr. Baker for the period from September 4, 1994, the date the Mr. Baker was terminated, through the date of trial, less amounts earned in mitigation;

b. prejudgment interest;

c. compensatory damages for out-of-pocket expenses, emotional distress, mental anguish and loss of self-esteem, in an amount to be determined at the time of trial;

d. punitive damages in an amount to be determined at the time of trial.

The amounts sought as compensatory and punitive damages is subject to the exclusions and limitations set forth in 42 U.S.C. § 1981a.

This response is based on information currently available to the Commission. The Commission will supple-

ment and/or amend this response when additional information is obtained, in accordance with the Local Rules and the Federal Rules of Civil Procedure.

6. State the full name, address, and telephone number of all persons or legal entities who have a subrogation interest in each claim, and state the basis and extent of said interest.

RESPONSE: All amounts recovered from Defendant Employer in this litigation will be received directly by Mr. Baker based on his charge of discrimination against Defendant Employer. Mr. Baker's address and telephone number are:

Eric Scott Baker
106 Oakdale Street
Gaston, S.C. 29053
Telephone: 803/926-8652

7. State the time you estimate it will take you to complete discovery. Explain if appropriate.

RESPONSE: 180 days.

8. As to each claim, state whether it should be tried jury or nonjury and why.

RESPONSE: The Commission's claim arises under the Americans with Disabilities Act of 1990, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a, *et al.* Pursuant to section 1981a(c) of the Civil Rights Act of 1991, the Commission is entitled to trial by jury of the ADA claim because compensatory and punitive damages are sought by the Commission on behalf of Mr. Baker. The Commission has timely requested a jury trial in this case.

9. If the plaintiff is a publicly-owned entity, or a partner, parent, subsidiary or affiliate of a publicly-owned entity, list the identity of the publicly-owned entity and its relationship to plaintiff. If there is a publicly-owned entity not a party to the case that has a significant financial interest in the outcome, identify such entity and the nature of the financial interest.

RESPONSE: Not applicable.

10. State the basis for asserting your claim in the division in which it was filed.

RESPONSE: The discriminatory actions alleged in the complaint against Defendant Employer occurred at Defendant Employer's principal place of business in West Columbia, South Carolina, within the venue of the Columbia Division of the United States District Court for the District of South Carolina.

11. Do you want a mediation conference to be scheduled in this case? If so, when?

RESPONSE: The Commission attempted unsuccessfully to conciliate with Defendant Employer on behalf of Mr. Baker prior to initiating this action. The Commission does not believe that mediation efforts would

be beneficial, and thus, does not request a mediation conference at this time.

9-4-96
DATE

Respectfully submitted,

C. GREGORY STEWART
General Counsel

ROSALIND GRAY
Deputy General Counsel

/s/ MINDY E. WEINSTEIN
MINDY E. WEINSTEIN
Regional Attorney

/s/ ROSEMARY J. FOX
ROSEMARY J. FOX
Supervisory Trial Attorney

/s/ DAVID R. TREETER
DAVID R. TREETER
Senior Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
129 West Trade Street
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Charlotte, NC 28202
(704) 344-6886

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3:96-2739-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Dec. 2, 1996]

AFFIDAVIT OF J. MICHAEL UPTON

I, J. Michael Upton, having been duly sworn by an officer authorized to administer oaths, deposes and states as follows:

1.

I am over twenty-one years of age and competent to testify to the matters contained herewith. This affidavit is based on my personal knowledge of the facts contained herein.

2.

I am currently employed as Vice President and General Counsel of Waffle House, Inc. ("Waffle House"), and I am familiar with the corporate structure and the rules and procedures of Waffle House. The document attached to this affidavit is a record made as a regular part of Waffle House's business activity and is kept by

Waffle House in the course of its regularly conducted business activities.

3.

Waffle House is based in Norcross, Georgia, and operates a multi-state chain of restaurants.

4.

Waffle House purchases food products, advertising and many other products and services from vendors throughout the United States.

5.

All prospective Waffle House employees are required to complete and sign a Waffle House employment application prior to being hired.

6.

Waffle House's employment application contains a provision requiring all disputes between the employee signing the application and Waffle House to be submitted to arbitration.

7.

Eric Scott Baker ("Baker") completed an application for employment with Waffle House on or about June 23, 1994.

8.

A true and correct copy of the Waffle House employment application executed by Baker is attached hereto as Exhibit "A".

9.

The claims alleged by the Equal Employment Opportunity Commission on behalf of Baker in this civil action are within the scope of potential controversies with Waffle House that Baker agreed to submit to arbitration.

FURTHER AFFIANT SAYETH NOT.

/s/ J. MICHAEL UPTON
J. MICHAEL UPTON

Sworn to and subscribed
before me this 25th day
of November, 1996.

/s/ DEBORAH M. MURPHY
Notary Public

My commission expires:
Notary Public, DeKolb County, Georgia
My Commission Expires Jan. 23, 1998
[seal omitted]

WAFFLE HOUSE®

AMERICA'S PLACE TO WORK
AMERICA'S PLACE TO EAT ®

MUST BE COMPLETED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT

(PLEASE PRINT PLAINLY)

TO BE COMPLETED UPON EMPLOYMENT	
Work Location _____	Rate _____
Position _____	Date _____

To Applicant: We deeply appreciate your interest in our organization and assure you that we are sincerely interested in your qualifications. A clear understanding of your background and work history will aid us in placing you in the position that best meets your qualifications and may assist us in possible future upgrading.

Date JUNE 23, 1994

Social Security No. 251-75-4659

Name BAKER (Last) ERIC (First) SCOTT (Middle) Telephone No. (803) 724-4777

Present Address 106 OAKDALE (No. / Street) STR. GASTON (City) SC (State) 29053 (Zip)

Next of kin to be notified in event of emergency: Name: ROBERT G OR SYLVIA G BAKER

Relationship: FATHER/MOTHER Address: 106 OAKDALE STR. GASTON SC 29053 Telephone No. (803) 724-4777

GENERAL INFORMATION

To Applicant: READ THIS INTRODUCTION CAREFULLY BEFORE ANSWERING ANY QUESTIONS IN THIS BLOCKED-OFF AREA. The Civil Rights Act of 1964 prohibits discrimination in employment practice because of race, color, religion, sex, or national origin. P.L. 90-202 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years old. The following requested information is needed for a bona fide occupational qualification, business necessity, or other legally permissible reasons. Answers to any questions below will not automatically bar employment to any applicant. Questions pertaining to race, color, sex, national origin, age, and marital status are necessary to insure our compliance with applicable discrimination laws.

Race: WHITE Birthdate: 10/27/74 Sex: M ✓ F ____ Height: 5 ft. 8 in. Weight 138 lbs.

Marital Status: Single ✓ Engaged ____ Married ____ Separated ____ Divorced ____ Widowed ____

Number of dependents including yourself Ø Are you a citizen of the U.S.A.? YES

Have you ever been bonded? NO If yes, on what jobs? ____

Have you ever been convicted of a crime in the past ten years? NO If yes, describe in full: ____

Are you now or have you been a user of or addicted to: Drugs NO Alcohol to excess ____

What kind of car do you drive? Make BUICK Model SKYHAWK Year 1985

Will you use your car to get to work? YES

If not, what method of transportation will you use to get to work? ____

Position(s) applied for ____ Rate of pay expected $ ____ per/hr. $ ____ per/wk.

Would you work Full-Time ✓ Part-Time ____ Specify days and hours if part-time ____

Were you previously employed by Waffle House? NO If yes, when and where? ____

List any friends or relatives working for us and where NONE (Names)

If your application is considered favorably, on what dates will you be available for work? TWO WEEK FROM TODAY 19 94

Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? I PAN A CREW + WORK IN THE FOOD BUSINESS FOR 4 YEARS.

Have you been refused a Health Permit to work at any occupation? NO If yes, explain fully: ____

Can you lift 20 lbs to shoulder height? YES

Are you able to remain standing on your feet for a full 7-10 hour shift? YES

Are you able to sweep, mop, etc.? YES

MILITARY SERVICE: Are you a veteran? NO If yes, dates of service: ____ Branch: ____

Rank attained: ____ Date/Type of dismissal: ____

Are you a member of any Reserve organization or National Guard? NO

BEST AVAILABLE COPY

• IMPORTANT •

NOTICE TO APPLICANT

Before we can hire you, the Government requires that we review and verify certain information. Please bring the following items with you on your first day.

1. Drivers license with your picture AND
2. A. U.S. social security card OR an original or certified copy of your birth certificate.

If you don't have any of the above, please tell the unit manager and he will tell you what other documents are acceptable for completing the I-9 form.

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

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FORM # 4002

EXHIBIT A

PERSONAL REFERENCES (Not former Employers or Relatives)

Name and Occupation	Address	Phone Number
Keith Gunter	P.O. Box 201 Gaston SC 29053	791-1601
Dennis Adams	104 Oakdale Dr Gaston SC 29053	939-0747
NITA Bridges	P.O.Box 1416 Gaston SC 29053	776-1360

RECORD OF EDUCATION

School	Name and Address of School	Dates Attendance Mo./Year	Course of Study	Circle Last Year Completed	Did You Graduate?	GPA	List Diploma or Degree
High	Swansea High School	90 - 94	Business	1 2 3 (4)	☑ Yes ☐ No		Diploma
College				1 2 3 4	☐ Yes ☐ No		
Other (Specify)				1 2 3 4	☐ Yes ☐ No		

WORK EXPERIENCE (List below last three employers, starting with last one first)

I

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
Little Caesars Restaurant	2	94	-	-	P.I.C. Run crew; handle money, prep, clean, etc.	4.25	5.50	Still employed.	PATTI: PHONE# 791-1704
REFERENCE CHECKED BY:									

II

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
Winn-Dixie	6	93	7	94	Deli. Asst mgr. Run CREW, prep clean, etc.	4.35	4.35	School.	Beenee PHONE# -
REFERENCE CHECKED BY:									

III

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
Bi-Lo	12	92	5	93	Bagger. Stocker	4.25	4.35	Manager. Medical - work-rm.	Seth Weddle PHONE#
REFERENCE CHECKED BY:									

NOTICE TO EMPLOYEES

Failure to be truthful on the application may affect the applicant's subsequent ability to receive workers' compensation benefits.

The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements or omission of facts called for on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial credit record through any investigative or credit agencies or bureaus of your choice. I further understand that I am an "Employee at Will" and that Waffle House, Inc. does not guarantee my employment for any specific period of time.

In making this application for employment I also understand that an investigative consumer report may be made whereby information is obtained through personal interviews with my neighbors, friends, or others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics, and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigative consumer report.

I FULLY UNDERSTAND THAT IF ASSIGNED TO ANY POSITION WHEREBY MONIES, EQUIPMENT, OR OTHER SUPPLIES OF WAFFLE HOUSE, INC. ARE ASSIGNED TO ME, I SHALL BE ACCOUNTABLE FOR THE AFORESAID ITEMS AND LIABLE FOR ANY SHORTAGES IN SAME. I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFFLE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYGRAPH OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW DURING ANY INVESTIGATION OF SUCH SHORTAGE OR LOSS, AS PART OF THIS APPLICATION PROCESS AND AS A CONDITION OF MY CONTINUED EMPLOYMENT, AT THE REQUEST OF WAFFLE HOUSE, INC. I AGREE TO SUBMIT TO TESTING TO DETERMINE MY USE OF DRUGS OR ALCOHOL. I UNDERSTAND THAT REFUSING TO SUBMIT TO A TEST OR A POSITIVE RESULT IN ANY TEST INDICATING DRUG OR ALCOHOL USE MAY RESULT IN MY IMMEDIATE TERMINATION FROM EMPLOYMENT.

IF THE POSITION TO WHICH I AM ASSIGNED SHALL BE A POSITION WHERE I NORMALLY RECEIVE TIPS, I UNDERSTAND THAT IT IS MY OBLIGATION TO REPORT ALL TIPS TO THE INTERNAL REVENUE SERVICE FOR INCOME TAX PURPOSES. THIS MAY BE DONE EITHER BY REPORTING THEM ON THE PRELIST OR ON MY TAX RETURN AT THE END OF THE YEAR. DELIBERATELY NOT REPORTING ALL INCOME COULD RESULT IN SEVERE PENALTIES.

I UNDERSTAND AND ACKNOWLEDGE THAT WAFFLE HOUSE IS TAKING A CREDIT AGAINST MY WAGES FOR TIPS RECEIVED, IN THE EVENT I DO NOT RECEIVE TIPS EQUAL TO THAT CREDIT. I SHALL NOTIFY MY UNIT MANAGER SO THAT MY TIPS CAN BE COUNTED AND AUDITED TO ESTABLISH WHAT LEVEL OF TIPS I AM MAKING. I UNDERSTAND WAFFLE HOUSE, INC. IS ALSO BOUND TO REPORT TO THE IRS THE AMOUNT OF THOSE TIPS THAT THEY COUNT. THE TIPS COUNTED WILL BE POSTED BY THE UNIT MANAGER ON THE PRELIST.

MEAL POLICY: As a part of your compensation, Waffle House allows its employees to eat during their shift at a reduced rate. This includes 1 full meal if your workday is 4 hours or less and 2 full meals if your workday is over 4 hours. In addition, beverages and snacks as desired are allowed. The only limitation is that dinner steaks, chicken and pork chops are not offered under this meal policy. Please try to eat the meal at some time during the shift. However, this should be during a slow time and must not interfere with customer service. To cover the cost of the meal, drinks, snacks and the time to eat these items, Waffle House will deduct from your paycheck an amount based on the number of hours worked that day. Please see your Unit Manager for the schedule of meal charges.

I have read and understand the above notice and agree to comply with the provisions above.

Signed this 23 day of June, 19 94

Signature of Applicant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3:96 2739-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

AFFIDAVIT OF ERIC SCOTT BAKER

Eric Scott Baker being first duly sworn, on oath, deposes and states as follows:

1. I am a graduate of Swansea High School in Swansea, South Carolina, and I have had no post-secondary education or formal training.

2. On June 23, 1994, I went to the Waffle House facility at I-26 and S.C. 302, in Columbia, South Carolina, and completed a Waffle House Application for Employment. I was twenty years of age at that time.

3. I completed the Waffle House Application for Employment while I was sitting in a booth at the restaurant.

4. A manager was sitting with me while I completed the application form.

5. The manager asked me questions regarding my transportation to work and the expected wage rate.

6. I was given a math test while I was at the restaurant, and the manger graded the test.

7. The manager did not point out any arbitration provision on the application form.

8. I believed that I was completing and submitting a standard application form; I did not notice or read on the application form any provision for arbitration.

9. The manager did not mention arbitration, nor did he mention anything about the way disputes were settled between the company and employees.

10. The manager hired me; however, I subsequently declined the job offer.

11. A few weeks after the job offer, I spoke with Mike Bradley, manager of another nearby Waffle House, Unit #446 in West Columbia, South Carolina, and Bradley offered me a job at Unit #446, which I accepted.

12. I did not have to reapply or take another math test when I was offered the job at Unit #446.

13. Mike Bradley did not mention arbitration, nor did he mention anything about the way disputes were settle between the company and employees.

14. While I worked at Unit #446, I was paid $5.50 an hour.

15. I have now been shown a copy of the application form which I submitted to Waffle House, and I have read the four lines of print at the bottom of the first page, which mention arbitration.

16. I do not understand what the arbitration provision means. Specifically, I do not understand how it relates to my charge of discrimination against Waffle House.

17. Waffle House gave me a separation notice, a true and correct copy of which is attached hereto as Exhibit A.

Further affiant sayeth not.

/s/ ERIC SCOTT BAKER
ERIC SCOTT BAKER

Subscribed and sworn to before me
this 23 day of December, 1996.

/s/ CINDY J. MUNCK
CINDY J. MUNCK
Notary Public

My commission expires: 1-10-2000

MAY 25 2001

Supreme Court, U.S.
FILED
MAY 25 2001
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No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an employee's agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission, as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as backpay, reinstatement, and damages.

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

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In the Supreme Court of the United States

No. 99-1823

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 7-35[1]) is reported at 193 F.3d 805. The opinions of the district court (Pet. App. 30a-34a) and of the magistrate judge (Pet. App. 37a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1999. A petition for rehearing was denied on January 14, 2000 (Pet. App. 35a-36a). On April 4, 2000,

[1] We have reprinted the opinion of the court of appeals in the Joint Appendix, because the footnotes to that opinion are misnumbered in the version reprinted in the appendix to the petition for certiorari.

the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 15, 2000, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans With Disabilities Act of 1990, the Civil Rights Act of 1964, and the Federal Arbitration Act are reproduced at Pet. App. 54a-63a.

STATEMENT

Eric Scott Baker filed a claim with the Equal Employment Opportunity Commission (EEOC) alleging that his employer, respondent Waffle House, Inc., had discharged him on the basis of disability, in violation of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101. In response to that claim, the EEOC brought this action against respondent in the United States District Court for the District of South Carolina, alleging that respondent had engaged in unlawful employment practices against Baker on the basis of disability. The court of appeals held that Baker and respondent had entered into an agreement to arbitrate employment-related disputes, and that while the EEOC was free to seek general injunctive relief, the agreement between Baker and respondent precluded the EEOC from obtaining other, victim-specific forms of relief, such as back pay, reinstatement, and compensatory and punitive damages. The court of appeals accordingly instructed the district court to dismiss the claims for those forms of relief.

1. When the EEOC was originally created by Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253, it was not authorized to bring suit against employers. Title VII as originally enacted

authorized only a private right of action by employees and a public right of action by the Attorney General in cases involving a "pattern or practice" of discrimination. See generally *General Tel. Co. of the N.W., Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980). The EEOC was given the authority to process charges of discrimination and, if possible, to work out conciliation agreements with employers, but it was not authorized to bring suit against an offending employer. *Ibid.* In 1972, Congress amended Title VII to provide the Commission with independent authority to bring suit in court, in both individual cases, see 42 U.S.C. 2000e-5(a) and 42 U.S.C. 2000e-5(f)(1), and "pattern or practice" cases, see 42 U.S.C. 2000e-6(c).[2]

The 1972 amendments created a dual system of private and public enforcement, in which "[t]he EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 was not superseded." *General Tel.*, 446 U.S. at 326. Before any suit can be brought, a charge must be filed with the EEOC by or on behalf of an aggrieved person or by a member of the EEOC. The EEOC investigates the charge. 42 U.S.C. 2000e-5(b). If the EEOC finds reasonable cause to believe that discrimination has occurred, it must attempt to conciliate the charge; if that effort is unsuccessful, the EEOC may choose to bring a public enforcement action in its own name. 42 U.S.C. 2000e-5(b), 2000e-5(f)(1). The forum for such an action is any federal district court within the State in which the unlawful practice occurred, the district in which the employment records are maintained, the district in

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[2] The Attorney General retains enforcement authority over cases involving a "government, governmental agency, or political subdivision." 42 U.S.C. 2000e-5(f)(1).

which the aggrieved person would have worked but for the unlawful practice, or, if the employer is not present in those districts, the district in which the employer has its principal office. 42 U.S.C. 2000e-5(f)(3).

If the EEOC files suit, an employee may intervene in the EEOC action but may not initiate a suit in the employee's own name. 42 U.S.C. 2000e-5(f)(1). If the EEOC fails to act within certain designated time periods or determines that it will not itself file a suit and so notifies the employee, the employee may bring a private suit under Title VII. 42 U.S.C. 2000e-5(f)(1). Regardless of whether the action is brought by the EEOC or by an employee, the relief available includes the full range of equitable relief including injunctive relief, back pay, and reinstatement. 42 U.S.C. 2000e-5(g)(1). See *General Tel.*, 446 U.S. at 324. In 1991, Congress expanded the relief available to a "complaining party"—defined to include both private plaintiffs and the EEOC, see 42 U.S.C. 1981a(d)(1)(A)—to include compensatory and punitive damages (as limited by the applicable statutory cap). See 42 U.S.C. 1981a(a)(1). The provisions authorizing the EEOC to initiate an enforcement action do not distinguish between general injunctive relief and victim-specific remedies.

Title I of the ADA outlaws discrimination in employment on the basis of disability. Title I expressly incorporates "[t]he powers, remedies, and procedures set forth in [Title VII]." 42 U.S.C. 12117(a). That includes the procedures outlined above applicable to enforcement actions brought by the Commission and the equitable relief available under 42 U.S.C. 2000e-5(g). In 1991, at the same time as it made damages available to a "complaining party" in a Title VII suit, 42 U.S.C. 1981a(a)(1), Congress in identical terms made the same forms of damages available to a "complaining party" in

an ADA suit. 42 U.S.C. 1981a(a)(2). The term "complaining party" was defined for ADA purposes—as for Title VII purposes—to include both private plaintiffs and the EEOC. 42 U.S.C. 1981a(d)(1)(B).

2. This case involves a public enforcement action brought by the EEOC. Eric Scott Baker applied for a position with respondent on June 23, 1994. J.A. 8. Baker filled out an employment application that included the following provision:

> The parties agree that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions, or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration.

J.A. 59.[3]

Baker began working for respondent on August 10, 1994. J.A. 9. Baker had a seizure disorder. On August 26, 1994, he had a seizure that lasted approximately 30 seconds just after arriving for work. He went home for the day, and the manager told him not to report for work because of his disorder. On September 5, 1994,

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[3] The facts recited in text are undisputed. Baker, however, was not employed by the store in Columbia, South Carolina, to which he submitted his employment application, but instead was employed by another of respondent's facilities in West Columbia, South Carolina, without filling out another employment application. Because of these and other facts, summarized at Pet. 5 n.1, the district court concluded that the arbitration clause in the application for the job in Columbia did not govern the job in West Columbia, while the court of appeals reached the opposite conclusion.

respondent terminated Baker's employment. J.A. 9; Pet. App. 32a.

Baker filed a charge of discrimination with the EEOC, complaining that his discharge violated the ADA. He did not submit a claim against respondent for arbitration. The EEOC initiated this enforcement action in September 1996, after attempts to conciliate Baker's charge failed. J.A. 36; Pet. App 40a. The EEOC filed the action in its own name "to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices." J.A. 36. The EEOC sought several forms of relief to address respondent's actions: an injunction barring respondent from employment discrimination on the basis of disability, an order requiring respondent to institute anti-discrimination policies and practices to create opportunities and eradicate the effects of past and present disability discrimination, back pay and reinstatement for Baker, compensation for pecuniary and non-pecuniary losses suffered by Baker, and punitive damages. J.A. 39-40.

In response to the EEOC's complaint, respondent filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to compel arbitration and to stay or dismiss the EEOC's enforcement action. The matter was referred to a magistrate judge, who filed a report concluding that Baker had entered into an arbitration agreement with respondent covering the instant claim. The magistrate judge recommended that the motion to dismiss the EEOC's action be denied, but that the motion to compel arbitration be granted and the proceedings in this case be stayed pending arbitration. J.A. 10-11; Pet. App. 33a.

The district court disagreed with the magistrate judge's conclusions. The court held that there was no enforceable arbitration agreement because Baker never agreed to arbitrate with respect to the specific job for which he was hired. See note 3, *supra*. Because there had been no agreement to arbitrate, the court denied the motion to dismiss and the motion to compel arbitration. Pet. App. 34a.

3. Respondent filed an interlocutory appeal pursuant to 9 U.S.C. 16(a)(1). A divided panel of the court of appeals reversed the district court's finding that there had been no agreement to arbitrate between Baker and respondent. J.A. 13. The court held that Baker's application "did form a binding arbitration agreement" between Baker and respondent. J.A. 13. The court then addressed the question of what effect, if any, the agreement between Baker and respondent had on the EEOC's enforcement action.

The court of appeals recognized that, "[i]n enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to 'advance the public interest in preventing and remedying employment discrimination.'" J.A. 13 (quoting *General Tel.*, 446 U.S. at 331). See also J.A. 14 (EEOC is not "merely an institutional surrogate for individual victims of discrimination"). Referring to the 1972 amendments to Title VII that had vested the EEOC with power to bring enforcement actions in its own name, the court noted that "it was clear that Congress intended by these [1972] Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." J.A. 14 (quoting *EEOC* v. *General Elec. Co.*, 532 F.2d 359, 373 (4th Cir. 1976)). The court explained that

Congress intended "to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact." J.A. 15.

From this statutory background, the court reached two conclusions. First, the court concluded that respondent "cannot succeed on its motion to compel the EEOC to arbitrate." J.A. 19. That conclusion was based on the court's recognition "that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate," J.A. 18, and that "the EEOC is not a party to any arbitration agreement," J.A. 18. The court stated that "the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest," J.A. 18—an argument that "disregards the EEOC's independent statutory role," J.A. 18. The court also noted that this Court had "recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements." J.A. 19 (citing *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)). Accordingly, the EEOC cannot be compelled to arbitrate pursuant to a private arbitration agreement to which it is not a party. J.A. 19.

Second, the court concluded that even though an employee's agreement to arbitrate does not bind the EEOC directly, it does preclude the EEOC from obtaining victim-specific relief—such as back pay, reinstatement, or damages—in a public enforcement action. Although the court acknowledged the federal statute giving the EEOC a distinct cause of action, it emphasized the federal policy "to give [an arbitration] contract effect in order to favor the arbitration mechanism for dispute resolution." J.A. 20. In the court's view, "[t]o permit the EEOC to prosecute in court Baker's individual claim * * * would significantly trample this

strong policy favoring arbitration." J.A. 20. The court stated that, "[b]ecause Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself." J.A. 20. The court concluded that "[t]he EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, but * * * it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims." J.A. 20 (internal citation omitted). The court thus distinguished between the EEOC's ability to seek general injunctive relief, which is not affected by the private arbitration agreement, and the EEOC's ability to seek victim-specific relief, which is barred by such an agreement.

As applied to this case, the court thus held that the EEOC could seek to enjoin respondent generally from engaging in discriminatory actions and it could seek an order directing respondent to carry out practices and programs to provide equal employment opportunity and eradicate the effects of past and present discrimination. J.A. 21-22. Those remedies, the court believed, furthered "the public interest in a discrimination-free workplace" and, thus, transcended any limitation imposed by Baker's agreement to arbitrate. J.A. 22. But the court held that the EEOC "cannot pursue Baker's individual remedies in court," such as "backpay, reinstatement, and compensatory and punitive damages." J.A. 23. Because the EEOC had stated that it had no intention to pursue those remedies in arbitration, the court "d[id] not reach the question of whether the EEOC is *authorized* to do so." J.A. 23. The court

remanded the case "with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted on behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief." J.A. 23-24. The court did not reach the question "whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks." J.A. 24 n.3.

Judge King filed a dissenting opinion, which focused on the issue of whether Baker and respondent had entered into an arbitration agreement with respect to the particular job for which he was hired. See note 3, *supra*; Pet. 5 n.1. He agreed with the district court that no such agreement had been reached, and he therefore did not address what effect a valid arbitration agreement would have on the EEOC's ability to litigate in its own name. J.A. 28. Judge King also suggested that the arbitration agreement might be unenforceable in any event because the arbitration clause was so inconspicuous that it was difficult to discern, J.A. 33 n.8; see J.A. 59, and because it provided for employer and employee to bear the costs of arbitration equally, J.A. 33 n.8. The issue of the agreement's validity and enforceability were not raised in the petition and, thus, are not before this Court.

SUMMARY OF ARGUMENT

The EEOC has the undisputed authority to examine claims of discrimination brought before it, to attempt to conciliate those it deems meritorious, to decide which ones are of sufficient public import to warrant the expenditure of public enforcement resources, and, if conciliation proves unsuccessful, to litigate those claims in federal court. Congress has expressly provided that the EEOC may obtain all of the forms of relief

authorized by statute in such cases, including victim-specific relief such as back pay, reinstatement, and compensatory and punitive damages. Nonetheless, the court of appeals held that a private arbitration agreement and a general federal policy favoring arbitration trumped the EEOC's statutory right to pursue victim-specific relief in this case. This Court should uphold the EEOC's statutory right to litigate in its own name and reverse the decision below.

I. The court of appeals' result is inconsistent with the plain language and structure of the Title VII (and ADA) enforcement scheme. Congress expressly provided in Title VII that the EEOC may bring a public enforcement action to obtain all forms of relief authorized by statute, and it underscored that determination when it added a damages remedy in 1991 and expressly included the EEOC among the parties that may obtain damages. The EEOC thus may choose from among all forms of relief authorized by the statute, whether victim-specific or general in nature—including injunctive relief, back pay, and damages—in deciding how best to serve the public interest in a particular case. The court of appeals' holding is inconsistent with the text of the statute, because it denies the EEOC the right to pursue forms of relief that the statute specifically authorizes it to pursue.

In addition, the structure of the Title VII enforcement scheme gives the EEOC rights to sue that are independent of and superior to those of private plaintiffs. The EEOC has an exclusive period after a charge is filed in which to decide whether to file suit and, if it does so, the private complainant is limited to intervention in the EEOC's suit. Moreover, the EEOC may initiate and maintain its suit, even if the victim of the alleged discrimination does not want the suit to go

forward. And of particular note here, the EEOC has sole choice of forum when it chooses to bring suit. The court of appeals' result is inconsistent with those statutory provisions, because it gives the private complainant—not the EEOC—control over the litigation. In particular, it gives the private litigant the ability to select the forum in which to obtain victim-specific relief by agreeing to resolve private employment-related disputes in an arbitral forum.

The court of appeals attempted to justify its departure from the Title VII enforcement scheme by elevating the policies underlying the FAA over the text of Title VII and the ADA. The court of appeals reasoned that, when an employee has signed an arbitration agreement, the federal policy favoring arbitration trumps Title VII. There is, however, no conflict between Title VII and the FAA, and any tension between Title VII's text and the FAA's policy should be resolved in favor of Title VII's text. The terms and policies of the FAA favor the enforcement of arbitration agreements to which a party has agreed. The EEOC, however, has not agreed to arbitrate. Accordingly, the terms and policies of the FAA are fully vindicated by permitting the EEOC to litigate in the judicial forum specified by Congress in Title VII, while giving the agreement its appropriate force if and when the employee seeks to intervene in the EEOC's action. The EEOC's ability to bring a distinct enforcement action is not something the employee can bargain away.

II. The reasoning of the court of appeals is flatly inconsistent with the policies reflected in Congress's structuring of the Title VII enforcement scheme. Under the original Title VII enforcement scheme, a public enforcement action would lie only in a case involving a "pattern or practice" of discrimination. Such

a case would presumably be one in which "broad injunctive relief" would be warranted. In 1972, Congress expanded the public enforcement role, however, by giving the EEOC the authority to litigate cases involving individual acts of discrimination. As this Court recognized in *General Telephone*, that expansion reflected Congress's determination that there can be a strong public interest, sufficient to warrant public enforcement, in identifying discrimination and remedying it even in such individual cases. The court of appeals' conclusion that the public interest in obtaining victim-specific relief is necessarily "minimal," J.A. 21, conflicts with the determinations Congress made in expanding the EEOC's enforcement role in 1972.

The reasoning of the court of appeals conflicts as well with this Court's oft-repeated recognition that victim-specific remedies are vital to the public goals of the antidiscrimination statutes. Back pay serves a powerful deterrent purpose because it provides the "spur or catalyst" for the defendant to eliminate discriminatory practices and for other employers not to adopt such practices. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Reinstatement likewise not only benefits the reinstated employee, but also sends a powerful message to others in the workplace that discrimination will not be tolerated. Punitive damages, when appropriate, clearly serve a predominantly public purpose by punishing the defendant and deterring others. There is no doubt that victim-specific remedies serve a private compensatory purpose as well. In the end, however, there is no basis in the statute to distinguish between victim-specific and broad injunctive relief, and there is similarly no basis for the court of appeals' across-the-board conclusion that the public interest in obtaining victim-specific relief is inevitably minimal. There is,

accordingly, no basis for precluding the EEOC from obtaining such remedies.

The court of appeals' decision, if allowed to stand, could seriously compromise the EEOC's ability to enforce the antidiscrimination laws. First, the court of appeals' characterization of the relief that remains open to the EEOC—"large-scale injunctive relief," J.A. 21—has no foundation in the statutory language and its meaning is necessarily indeterminate. Second, injunctive relief may not be adequate to deter employment discrimination in some circumstances, either because the EEOC cannot establish the prerequisites for injunctive relief, or because injunctive relief can be a toothless sanction. But under the court of appeals' decision, the EEOC would be unable to supplement injunctive relief with monetary sanctions against any employer who, like respondent, requires all employees to sign arbitration agreements. To be sure, this Court recognized the ability of employers to bargain with their employees for arbitration clauses that require the arbitration of suits brought by employees. See *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302 (2001). But such agreements cannot prevent the EEOC from pursuing those enforcement actions that are essential to the public functions Congress intended the EEOC to serve.

Finally, no countervailing policy considerations support the court of appeals' rule. The rule is not needed to prevent victims of discrimination from obtaining double recoveries through EEOC actions, because mechanisms are readily available for that purpose. Nor does the rule reduce redundant or duplicative proceedings; to the contrary, it would virtually require duplicate arbitral and judicial proceedings, because the victim can often obtain victim-specific remedies only in

the arbitral forum, while the EEOC ordinarily seeks (and may be limited to seeking) its remedies in federal court. Nor is the court of appeals' rule needed to promote respect for the private arbitration system; to the contrary, this Court has recognized that EEOC enforcement in a case like this respects, rather than circumvents, the private arbitration system. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Just as the government may seek victim-specific relief for discrimination from a State even though a private action for the same relief would be barred by sovereign immunity, see *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 121 S. Ct. 955, 968 (2001), so too an EEOC action for victim-specific relief for discrimination may proceed even though a private action for the same relief may be barred by an arbitration agreement. In each case, permitting the public action while barring the private one simultaneously respects both the bar (whether imposed by sovereign immunity or by a private contract) and the enforcement of the federal antidiscrimination laws.

ARGUMENT

I. THE EEOC'S STATUTORY AUTHORITY TO OBTAIN VICTIM-SPECIFIC RELIEF IN A PUBLIC ENFORCEMENT ACTION DOES NOT CONFLICT WITH THE TERMS OR POLICIES OF THE FEDERAL ARBITRATION ACT

The court of appeals held that a private arbitration agreement barred the EEOC from obtaining victim-specific remedies in this case.[4] Denying the EEOC the

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[4] The question presented in this case assumes that the private arbitration agreement is enforceable as between the employee and the employer. But cf. J.A. 24-35 (King, J., dissenting). If not en-

right to obtain victim-specific remedies on the basis of an arbitration agreement to which it was not a party contravenes the plain text of Title VII, as incorporated in the ADA. Title VII expressly gives the EEOC a distinct cause of action with a full range of remedies and grants the EEOC—not the employee— control over litigation it initiates, even when it seeks victim-specific remedies. That statutory authorization cannot be disregarded on the ground that the terms or policies of the FAA conflict with the EEOC's express statutory rights. The terms and the policies of the FAA are fully vindicated by ensuring that the parties to the arbitration agreement respect the agreement. Neither the terms nor the policies of the FAA support any limit on the statutory rights of the EEOC, which has not agreed to arbitrate any dispute.

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forceable as a private matter, the agreement plainly has no impact on the EEOC. The assumption that an arbitration agreement is enforceable as between the employee and the employer may not always hold true. See, *e.g.*, *Green Tree Fin. Corp.* v. *Randolph*, 121 S. Ct. 513, 522-523 (2000) (agreement unenforceable if it imposes "prohibitive costs" on the statutory claimant); *Duffield* v. *Robertson Stephens & Co.*, 144 F.3d 1182, 1187-1200 (9th Cir.) (agreement mandating arbitration of Title VII claims unenforceable under the Civil Rights Act of 1991), cert. denied, 525 U.S. 982 and 525 U.S. 996 (1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (agreement unenforceable unless, at a minimum, it establishes an "arbitration arrangement" that "provides for all of the types of relief that would otherwise be available in court"); *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 694 (Cal. 2000) (arbitration agreement unenforceable as "unconscionable" where it lacked "mutuality" and did not "permit the full recovery of damages for employees").

A. The Fourth Circuit's Result Is Inconsistent With The Text And Structure Of Title VII

1. As originally enacted, Title VII authorized only a private right of action against employers and a public action (by the Attorney General) in "pattern or practice" cases. See generally *General Tel. Co. of the N.W., Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980). In 1972, Congress amended Title VII to provide the EEOC with independent authority to bring suit in court, thus creating a dual system of private and public enforcement. See 42 U.S.C. 2000e-5(a), 2000e-5(f)(1).

2. a. As part of this dual enforcement scheme, the text of Title VII (and, thus, of the ADA, which incorporates that text) expressly grants the EEOC its own cause of action, and it grants the EEOC the right to obtain all statutory remedies in any action it brings. Section 706(f)(1) of Title VII provides that, if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent." 42 U.S.C. 2000e-5(f)(1). Section 706(g) further provides that if the court finds intentional discrimination in such an action, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g)(1). Accordingly, as the Court explained in *General Telephone*, "Section 706(f)(1) specifically authorizes the EEOC to bring a civil action against any respondent not a governmental entity * * *, the purpose of the action being to terminate unlawful practices *and to secure appropriate relief, including 'reinstatement or hiring . . ., with or without*

back pay.'" 446 U.S. at 324 (emphasis added) (quoting 42 U.S.C. 2000e-5(g)).

The text of Title VII does not limit the relief available to the EEOC or otherwise distinguish the relief available to the EEOC from the relief available to a private litigant. To the contrary, the statute in clear terms authorizes the EEOC to obtain all of the listed forms of relief. "[T]he EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals." *General Tel.*, 446 U.S. at 324. Indeed, Congress gave the EEOC complete control over the relief—even the victim-specific relief—it sought. As the Court explained in *General Telephone*, the EEOC could seek the most effective overall relief in a particular case even where some victims of discrimination "may appear to be disadvantaged" by the EEOC's choice. *Id.* at 331.

In 1991, when Congress amended Title VII and the ADA to provide for a damages remedy, Congress specifically reaffirmed that the EEOC should have available the full range of statutory remedies—which now included damages—when it brings an enforcement action. The amendments specify that damages are available to a "complaining party" in a Title VII suit and in an ADA suit. 42 U.S.C. 1981a(a)(1) and (a)(2). Although a damages remedy might be thought to be peculiarly victim-specific, the term "complaining party" was not limited to employees who brought claims to the EEOC. Instead, Congress specifically decided that the EEOC should also have the right to obtain the new damages relief after concerns were raised that the failure to do so in an earlier version of the bill would "undermine the [EEOC's] ability to enforce Title VII and the ADA." 137 Cong. Rec. 28,860-28,861 (1991)

(letter from EEOC Chairman Evan J. Kemp, Jr. to Sen. Kennedy).[5] Accordingly, the term "complaining party" was defined to include "the Equal Employment Opportunity Commission, the Attorney General, [or] a person who may bring an action or proceeding under [Title VII or the ADA]." 42 U.S.C. 1981a(d)(1)(B). In short, under both the older version of the statute and the 1991 amendments, the EEOC is plainly authorized "to sue in its own name to enforce federal law by obtaining appropriate relief"—which now includes damages—"for those persons injured by discriminatory practices forbidden by the Act." *General Tel.*, 446 U.S. at 324-325.

b. The court of appeals' rule precluding the EEOC from obtaining victim-specific relief is flatly inconsistent with Title VII's express authorization of such relief in a public enforcement action. Congress could have structured Title VII so that only a subset of remedies was available to the EEOC, if it believed that only a subset of remedies genuinely vindicates the interests of the public, rather than the private interests of the victim. Alternatively, Congress could have permitted victim-specific relief only in cases in which an individual victim is the plaintiff or intervenor. Had it done so, an individual's agreement to arbitrate discrimination claims likely would have barred such relief in a public enforcement action, because the arbitration agreement may well bar the individual from intervening in such a suit. See pp. 24-26, *infra*. Instead of

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[5] The letter cited in text warned that, without including the EEOC as a "complaining party," the EEOC might "have a duty to refer all cases of intentional discrimination to private attorneys because, by filing suit, the [EEOC] would dramatically reduce the relief available to the victims [who would be able to seek compensatory and punitive damages in their own actions]."

pursuing either of those courses, Congress chose to permit the EEOC to pursue victim-specific equitable (and now, legal) relief in a public enforcement action, regardless of whether the private complainant chose to intervene. The court of appeals' decision depriving the EEOC of the right to obtain victim-specific relief is inconsistent with the text of Title VII.

3. a. The court of appeals' decision is also inconsistent with the structure of Title VII. That structure makes clear that, although private litigants bring the vast majority of cases under the federal anti-discrimination statutes, the EEOC's statutory rights to bring suit are independent of and superior to the rights of private individuals. When a charge is filed, the EEOC has exclusive jurisdiction over the charge for 180 days or until a right-to-sue letter has been issued. See 42 U.S.C. 2000e-5(f)(1).[6] The private complainant has no separate cause of action if the EEOC files suit during that time, although the employee may intervene in the EEOC's suit. 42 U.S.C. 2000e-5(f)(1). Indeed, the EEOC may initiate and maintain its suit, even if the individuals for whom it seeks relief disavow the suit and claim not to want relief. See, *e.g.*, *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535-1537 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997); *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1195-1196 & n.8

[6] Even after the 180-day period, a private suit may be commenced only if the charging party has received a right-to-sue letter from the EEOC. See 42 U.S.C. 2000e-5(f)(1). The EEOC is not beholden to the individual charge. The EEOC can file its own charge. See 42 U.S.C. 2000e-5(b). The EEOC can expand the investigation of a charge to include "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the [charge]." *General Tel.*, 446 U.S. at 331. Once a charge is filed, it cannot be withdrawn without the EEOC's consent. See 29 C.F.R. 1601.10.

(5th Cir. 1984). Cf. *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 302 (1985) (permitting public enforcement suit under Fair Labor Standards Act over the objections of employees because "the purposes of the Act require that it be applied even to those who would decline its protections"). And the attorneys appointed by the EEOC in a public enforcement action represent the EEOC; they do not represent the charging party. See 42 U.S.C. 2000e-4(b)(2) (attorneys appointed by the EEOC "appear for and represent the Commission"). In sum, Title VII provides the EEOC with a distinct right to sue that is not the individual complaining employee's to bargain away.

The statutory structure gives the EEOC particular control over the choice of forum in a public enforcement action. Title VII addresses with great precision the fora in which the EEOC may bring suit—any federal district court in the State in which the discrimination occurred, the district in which the employment records are maintained, the district in which the aggrieved person would have worked, or, if necessary to find the respondent, the district of the respondent's principal office. 42 U.S.C. 2000e-5(f)(3). Even though the private complainant's right to individual damages will be finally determined in the EEOC suit, the employee has no control whatever over the forum in which the EEOC's discrimination claim will be brought and no right to bring an individual suit in another forum once the EEOC's litigation has begun. Congress left the choice of forum in such a suit entirely up to the EEOC.

b. The court of appeals' decision contravenes that statutory structure, because it gives the choice of forum in part to a private individual. This Court has observed that an individual's agreement to arbitrate disputes "is, in effect, a specialized kind of forum-selection clause

that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Thus, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). See also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 29 (1991); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989). In a public enforcement action, however, Congress granted the choice of forum to the EEOC, not to private individuals. The EEOC in this case has not chosen to bring its claim or any part of its claim—including its claim for victim-specific relief—in an arbitral forum.[7] Accordingly, the private individual's choice of an arbitral forum, although binding on that individual, can have no effect on the EEOC.[8]

In short, Congress clearly and expressly gave the EEOC an enforcement action and choice of both

[7] As the court of appeals noted (J.A. 23), there could be a significant question whether the EEOC has authority to pursue a discrimination claim in an arbitral forum. See 42 U.S.C. 2000e-4(b)(2) ("Attorneys appointed under [Title VII] may, at the direction of the Commission, appear for and represent the Commission in any case *in court*.") (emphasis added).

[8] Congress has encouraged alternative—including arbitral--resolution of private discrimination claims "[w]here appropriate and to the extent authorized by law." 42 U.S.C. 12212; see *Wright* v. *Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 n.2 (1998). With respect to public discrimination claims, however, it has instead required the EEOC to attempt "conference, conciliation, and persuasion" before bringing suit. 42 U.S.C. 2000e-5(b); see also 2000e-5(f)(1). And, if conciliation fails, it has specified federal district courts as the fora in which EEOC suits are to be brought.

remedies and fora. The court of appeals' approach effectively gives control over the types of relief the EEOC may obtain and the forum in which they may be obtained to private parties, based on arbitration agreements they (but not the EEOC) have signed. That decision is inconsistent with Congress's choice.

B. The FAA Does Not Support Any Limitation On the Remedies The Antidiscrimination Laws Make Available To The EEOC, Because The FAA's Terms And Policies Are Fully Vindicated By Holding The Complainant To His Agreement To Arbitrate

1. The court of appeals justified its extra-statutory limitation on the remedies the EEOC may obtain in this case by elevating what it believed to be the FAA's policy over the plain terms of Title VII. The court of appeals reasoned that "[t]o permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample th[e] strong policy favoring arbitration" embodied in the FAA. J.A. 20. In the court's view, a "balance" must be struck between the "competing policies" of the FAA and the antidiscrimination statutes, J.A. 21, by depriving the EEOC of its statutory right to obtain victim-specific remedies when the victim (but not the EEOC) has agreed to arbitrate employment-related disputes. See also *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998) (stating that EEOC's public enforcement role and the FAA represent "competing public interests"). That analysis is flawed on two levels—there is no conflict between the FAA's policy and Title VII's text, and even if there were, it would provide no basis for disregarding Title VII's grant of authority to the EEOC.

2. There is no conflict between the terms or policies of the FAA and the antidiscrimination statutes, and there is thus no basis for the court of appeals' conclusion that the remedies available under the antidiscrimination statutes must give way to accommodate the FAA. The terms and policies of the FAA are fully vindicated by holding the private complainant (who agreed to arbitration) to his agreement, while permitting the EEOC (which has not agreed to arbitration) to pursue the full range of remedial options authorized by the antidiscrimination statutes.

a. The FAA, "as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp.*, 473 U.S. at 625. The "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Id.* at 626. Because arbitration "is a matter of contract," a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Forcing arbitration on an unconsenting party is inconsistent with both the terms and the policies of the FAA.

b. In the present posture of this case, it must be assumed that Baker himself signed a valid and binding agreement to arbitrate employment-related disputes with respondent. See note 3, *supra*; Pet. 5 n.1. That means that Baker must arbitrate his individual claim against respondent under the ADA. Therefore, if the EEOC had determined that it would not bring suit and Baker's own cause of action had thereby ripened, and if Baker had filed his own suit against respondent without attempting arbitration, Baker's agreement would bar

his suit. For that reason, in the vast majority of cases (see p. 26 & note 9, *infra*), an employee's agreement to arbitrate will preclude all judicial consideration of his complaint.

Moreover, even in the relatively rare cases in which the EEOC initiates a public enforcement action, the arbitration agreement significantly restricts the options available to the private employee. Thus, for example, if Baker attempted to intervene in the EEOC's suit under 42 U.S.C. 2000e-5(f)(1), his agreement to arbitrate his disputes with his employer would ordinarily bar intervention. That likely inability to intervene is significant. As this Court noted in *General Telephone*, in a public enforcement action "the EEOC is authorized * * * to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged." 446 U.S. at 331. Indeed, "[t]he individual victim is given his right to intervene for this very reason," *ibid.*—*i.e.*, to protect his own rights where the EEOC has determined that the public interest would best be served by compromising or even abandoning some of the claims for relief for that individual. By agreeing to arbitrate his claims, Baker has agreed, *inter alia*, to forego that statutory right to intervene in a judicial action brought by the EEOC; Baker is likely to face the choice of enforcing his own right to relief in an arbitral forum or not at all. Accordingly, whether or not the EEOC initiates a public enforcement action, the terms and policies of the FAA are fully vindicated by ensuring that the arbitration agreement binds the parties who signed it.

In short, the EEOC did not agree to arbitrate its dispute with respondent. Nothing in the terms of the FAA (which merely provide that agreements to arbitrate are enforceable) or the policies of the FAA (which

favor arbitration where the parties have agreed to it) prevents the EEOC from invoking its statutory authority to bring a public enforcement action against respondent and to obtain all statutory remedies (including victim-specific remedies) provided for such an action.

3. In addition, even if the policy favoring arbitration embodied in the FAA were implicated in this case, permitting the EEOC to seek full relief in its own actions would not have a serious impact on that policy. The EEOC has the primary enforcement role under the federal antidiscrimination statutes in the sense that it sues to vindicate the "overriding public interest in equal employment opportunity." *General Tel.*, 446 U.S. at 326. When the EEOC elects to exercise its independent authority to sue, its role is predominant. The EEOC, however, has very limited resources. As a percentage of the total lawsuits filed under the antidiscrimination statutes, the number of lawsuits filed by the EEOC is quite low.[9] Moreover, as explained above, arbitration agreements continue to constrain the litigation options of the signatories even in the relatively rare cases in which the EEOC initiates a public enforcement action. Accordingly, the ability of the EEOC to sue and obtain victim-specific relief represents at most a minimal encroachment on the regime of private arbitration.

4. Finally, even if (contrary to fact) there were some tension between the text and structure of Title VII and the policies underlying the FAA, that would not justify

[9] For example, the EEOC filed 439 lawsuits in fiscal year 1999 and 291 in 2000. See http://www.eeoc.gov/stats/litigation.html (May 15, 2001). The total number of fair employment lawsuits filed in federal court during fiscal year 1999 was 22,412. See Daily Lab. Rep. (BNA) A-1 (Mar. 24, 2000).

the court of appeals' decision to elevate congressional policy over statutory text. Here, the text of Title VII clearly gives the EEOC the right to pursue a distinct statutory enforcement action and to secure the full range of remedial options. Enforcing the terms of an arbitration agreement against its signatories fully vindicates the policies underlying the FAA. But if that were not the case, the policies underlying the FAA would not provide a sufficient basis for imposing judicial limitations on remedies clearly and expressly made available to the EEOC under Title VII.

II. BECAUSE THE EEOC SEEKS TO VINDICATE THE PUBLIC INTEREST WHEN IT SEEKS VICTIM-SPECIFIC REMEDIES, THERE IS NO BASIS FOR A CONCLUSION THAT IT MERELY REPRESENTS PRIVATE PARTIES IN SUCH CASES OR SHOULD BE BOUND BY PRIVATE AGREEMENTS

On a broader level, the structure of Title VII embodies a congressional policy that there can be a strong public interest in obtaining each of the forms of relief authorized by statute and a congressional delegation to the EEOC—not the courts—of the authority to decide when the public interest warrants bringing a public enforcement action to obtain that relief. The court of appeals should have honored—not disputed—that congressional policy and that delegation of authority.

A. Congress's Broadening Of The Public Enforcement Role In 1972 Beyond "Pattern Or Practice" Cases Was Based On The Premise That There Is A Strong Public Interest In Remedying Individual Cases Of Discrimination

1. As noted above, see pp. 2-3, *supra*, before 1972, Title VII provided for public enforcement (by the Attorney General) only in cases involving a "pattern or practice" of discrimination. See 42 U.S.C. 2000e-6 (1970). Such actions "did not depend upon the filing of a charge with the EEOC; nor were they designed merely to advance the personal interest of any particular aggrieved person." *General Tel.*, 446 U.S. at 327. Instead, they were designed to attack widespread discrimination that was likely to affect a greater number of employees and to warrant broad injunctive relief.

In 1972, Congress decided to broaden the public enforcement role by providing for EEOC authority to bring actions not only in "pattern or practice" cases whose enforcement had previously been assigned to the Attorney General, but also in cases in which the only claim was that there had been a particular act or acts of discrimination against one or more private individuals. Congress took that step because the "failure to grant the EEOC meaningful enforcement powers [had] proven to be a major flaw in the operation of Title VII." S. Rep. No. 415, 92d Cong., 1st Sess. 4 (1971). Congress bestowed litigation authority on the EEOC on the premise that the EEOC would protect "the overriding public interest in equal employment opportunity" through direct "[f]ederal enforcement," even in individual cases of discrimination. 118 Cong. Rec. 4941 (1972).

Congress thus recognized in 1972 that discrimination even against a single person could offend not merely an individual, private interest, but society's interest in

rooting out and remedying discrimination. Congress did not give the EEOC the resources to litigate *all* possibly meritorious individual claims of discrimination. But Congress's extension of authority to the EEOC to pursue cases of individual discrimination embodied Congress's determination that, when the EEOC selects a case to litigate, there is a dominant public (not merely a private) interest in ending the discrimination in that case, in obtaining compensation for the victim, and in deterring the defendant and other employers from further discrimination.

2. This Court underscored that the EEOC's interest in obtaining victim-specific relief is primarily a public—not a private—interest in its decision in *General Telephone*. In *General Telephone*, the employer argued that the EEOC's Title VII suits should be considered "representative" actions, subject to the prescriptions of Federal Rule of Civil Procedure 23, because the EEOC in bringing a public enforcement action is simply standing in for the private interests of the individual employees who benefit from the suit. 446 U.S. at 326. This Court disagreed, ruling that the EEOC "sue[s] in its own name to enforce federal law" and "is not merely a proxy for the victims of discrimination." *Id.* at 324-326. This Court concluded that, "[w]hen the EEOC acts, *albeit at the behest of and for the benefit of specific individuals*, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* at 326 (emphasis added). The court specifically relied on that public interest in concluding that "the EEOC's enforcement suits should not be considered representative actions subject to Rule 23." *Ibid.* As this Court explained, even when the EEOC seeks "specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of

discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.'" *Ibid.* (quoting 118 Cong. Rec. at 4941).

3. The court of appeals' decision is premised on a disregard of both the congressional determination that the public interest may be served by obtaining victim-specific relief and the congressional delegation of authority to the EEOC—not the courts—to determine when a public enforcement action seeking such relief should be brought. The court of appeals reasoned that "the EEOC's public interest is minimal" when it seeks victim-specific relief, because in that context "the EEOC seeks primarily to vindicate private, rather than public, interests." J.A. 21. In the court's view, only "when the EEOC is pursuing large-scale injunctive relief" does "the balance tip[] in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action." J.A. 21. There was, however, no warrant for the court of appeals to assess the strength of the public interest in various types of remedy. By expanding the public enforcement role in 1972, Congress determined that there is a sufficient public interest in victim-specific relief whenever the EEOC initiates a public enforcement action and determines that such relief is worth pursuing. Congress did not categorically preclude victim-specific remedies, but left to the EEOC the judgment as to which remedies would best serve the public interest in a particular enforcement action. Because Congress has already made the relevant policy judgment about the strength of the public interest in such cases, the court of appeals erred in restricting the EEOC's statutory

authority based on second-guessing the congressional judgment.[10]

B. This Court Has Frequently Recognized The Broad Public Purposes Served By Victim-Specific Remedies

This Court has recognized that victim-specific remedies are vital to the public—not merely private—goals of the antidiscrimination statutes in other contexts as well. The Court has noted that back pay, for example, serves both "deterrence and * * * compensation objectives." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995). Back pay does not simply make the individual victim whole; it provides the "spur or catalyst which causes employers * * * to endeavor to eliminate, so far as possible, [their discriminatory practices]." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975) (quoting *United States* v. *N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)). It is therefore an essential weapon in the EEOC's arsenal.

Reinstatement and similar remedies likewise provide public benefits beyond the private benefit to the reinstated employee. The reinstatement of an employee previously separated sends a powerful message to the entire workplace that discrimination will not be tolerated and that disfavored individuals cannot be removed from the workplace. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 195 (1941) (noting, in labor relations case, that "[r]einstatement may be the effective

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[10] Elsewhere in its opinion, the court stated that "the Supreme Court has recognized implicitly that the EEOC, *acting in its public role*, is not bound by private arbitration agreements." J.A. 19 (emphasis added; citing *Gilmer*, 500 U.S. at 28, 32). The court ignored the fact that the EEOC acts "in its public role" when it seeks victim-specific remedies, and it thereby "is not bound by private arbitration agreements."

assurance of the right of self-organization"); *Blim* v. *Western Elec. Co.*, 731 F.2d 1473, 1478 (10th Cir.) ("[R]einstatement has the dual purpose of protecting the discharged employee and demonstrating the employer's good faith to the other employees."), cert. denied, 469 U.S. 874 (1984).

Punitive damages are even more closely geared to the public interest, because they are designed to punish the wrongdoer rather than to compensate or "make whole" the victim of discrimination. The court of appeals did not expressly address the question whether the public interest in obtaining punitive damages is "dominant" or "minimal," and it is therefore unclear on what basis the court precluded that element of victim-specific relief. See J.A. 21 (ruling that the EEOC's "public interest is minimal" when it seeks "'make-whole' relief for a charging party" without any discussion of punitive damages). This Court has recognized, however, that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). See also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 281 (1994) ("The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions."). That is primarily a public, not private purpose, and there is accordingly no basis, even under the court of appeals' reasoning, to preclude the EEOC from obtaining punitive damages in appropriate cases.[11]

[11] In other areas of public enforcement, the courts of appeals have recognized that the federal government may exercise its public enforcement authority even when it seeks relief for individuals whose private claims would otherwise be barred. *E.g.*, *Herman* v. *South Carolina Nat'l Bank*, 140 F.3d 1413, 1422-1427 (11th Cir. 1998) (enforcement action brought under the ERISA), cert. denied, 525 U.S. 1140 (1999); *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 688-697 (7th Cir. 1986) (en banc) (same). The reason is simple: *"[T]he United States has an interest in enforcing federal law that is independent of any claims of private citizens;"* by obtaining "monies" for the individual "beneficiaries" of a federal statute, the government vindicates its "unique, distinct, and separate public interest" in maintaining compliance with federal law. *Id.* at 693 (quoting *Donovan* v. *Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984)).

C. Preventing The EEOC From Recovering Victim-Specific Remedies In Any Case In Which There Is A Private Arbitration Agreement Would Seriously Compromise The EEOC's Ability To Enforce The Antidiscrimination Statutes

1. The decision of the court of appeals, if allowed to stand, could have serious consequences for the EEOC's public enforcement role. The court of appeals ruled that the EEOC may not recover victim-specific remedies in any case in which the victim of discrimination has signed an arbitration agreement with an employer. That ruling opens the door to an across-the-board limit on the EEOC's enforcement powers. By adopting a company-wide mandatory arbitration program, an employer could immunize itself from any EEOC action seeking victim-specific remedies.

2. This case illustrates the point. Respondent is a national employer, and, like many national employers, respondent has included an arbitration provision in its standardized employment application, one that it claims is tendered to all of its prospective employees. See J.A. 56 (affidavit of respondent's general counsel stating that "[a]ll prospective Waffle House employees are

required to * * * sign a Waffle House employment application prior to being hired" and that "Waffle House's employment application contains a provision requiring all disputes between the employee signing the application and Waffle House to be submitted to arbitration"); J.A. 59 (arbitration agreement in this case). Under the rationale of the court of appeals, the EEOC could never file a suit for damages or other victim-specific relief against respondent because all of respondent's employees have agreed to arbitrate. Regardless of the extent to which respondent engaged in forbidden discriminatory practices, the EEOC would not be able to recover victim-specific remedies or use the threat of punitive damages to deter future discrimination. By the simple expedient of including a standard arbitration provision in its employment applications, respondent would undercut the EEOC's ability to police respondent's compliance with the antidiscrimination statutes.

3. The decision of the court of appeals does leave the EEOC free to pursue a claim for "broad injunctive relief." The scope of remaining EEOC authority under that standard, however, is unclear and, in any event, it fails to fill the enforcement gap left by the court's preclusion of the EEOC from pursuing victim-specific remedies.

a. It is not clear what the court of appeals meant when it used the term "large-scale injunctive relief," J.A. 21, to describe the relief that the EEOC could continue to obtain in the face of a private arbitration agreement. See also J.A.8 ("broad-based injunctive relief"), 23 ("broad injunctive relief"). If the court meant to apply a test that would turn on the number of employees affected, then the court's rule would appear to make an unjustifiable and quite indeterminate distinction

between the remedies available depending on the size of the firm that has practiced discrimination and the number of workers involved. On the other hand, if the court meant to permit all injunctive relief while excluding relief that would result in money payments or reinstatement, then it would appear to permit specific injunctions directed at the treatment of specific employees, regardless of whether they had signed arbitration agreements—a result that appears to be at odds with the court's reasoning. At bottom, the difficulty of drawing the line intended by the court of appeals is the result of the court's misguided effort—without any statutory guidepost—to distinguish generically among types of relief on the theory that some serve the public interest more than others. Congress decided that all authorized forms of relief are in the public interest (even if they may be in the private interest of the victims as well) when it made all of them available in public enforcement actions brought by the EEOC. That is sufficient to resolve this case.

b. Not only is it difficult to define the relief that would remain open in theory to the EEOC, but it also is not clear that in practice the EEOC would always be able to obtain meaningful injunctive relief under the court of appeals' rule, even in otherwise meritorious cases. In this case, for example, the court of appeals noted respondent's argument "that the EEOC is not entitled to broad injunctive relief because its claim relies exclusively on the incident involving Baker," but "le[ft] to the district court the question of whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks." J.A. 24 n.3. If that means that in this case or in other cases the EEOC would be unable to maintain an otherwise meritorious action because "broad injunctive relief" would be unavailable, see, *e.g.*,

United States v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *EEOC* v. *General Lines, Inc.*, 865 F.2d 1555, 1565 (10th Cir. 1989); but cf. *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1250-1251 (10th Cir. 1999), that result would completely negate the EEOC's independent statutory right to bring an action. Turning the statutory scheme on its head, the court of appeals' rule would preclude the EEOC from bringing any action simply because a private party has agreed to arbitrate.

Moreover, an important goal of the EEOC in deciding whether to bring a public enforcement action is frequently to obtain clarification of the law to guide employers and employees alike. And "[t]he disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misapplication of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. at 358-359. Insofar as the EEOC is barred from litigating otherwise meritorious cases by private arbitration agreements, its ability to achieve those public objectives is thwarted.

c. In addition, even in cases in which the EEOC's suit is not entirely precluded, broad injunctive relief, while an important weapon in the EEOC's enforcement arsenal, simply cannot substitute for meaningful victim-specific relief.[12] As this court explained in *Albemarle*

[12] As this Court has explained—most recently in *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302, 1313 (2001)—"there are real benefits to the enforcement of arbitration provisions," including avoidance of litigation costs. Nonetheless, arbitration does not produce precedent to guide employers and employees not involved in the particular case—an important function of the EEOC's enforcement role. Even if arbitration clauses merely had the effect of precluding the EEOC from litigating issues that have to do with back pay, reinstatement, damages, and the like, one important public role of the EEOC would be limited.

Paper, "[i]f employers faced only the prospect of an injunction order, they would have little incentive to shun practices of dubious legality." 422 U.S. at 417. Congress made a similar judgment in the Civil Rights Act of 1991. Determining that the existing range of essentially equitable remedies (including back pay) may not be effective, Congress added compensatory and punitive damages to the remedial mix. See Pub. L. No. 102-166, § 2, 105 Stat. 1071 (citing the need for "additional remedies"). With respect to the EEOC in particular, Congress determined that the EEOC's enforcement authority would be undermined if it did not enjoy the full range of remedies available to private litigants. Therefore, Congress granted the EEOC the authority to pursue compensatory and punitive damages, despite their victim-specific character. See p. 20, *supra*. In many cases, employers need the "spur," *Albemarle Paper*, 422 U.S. at 418, of the full range of sanctions to prompt them into the type of self-examination that will deter future acts of discrimination.

Indeed, the decision of the court of appeals threatens to relegate the EEOC to its pre-1972 state—an agency without the necessary tools to enforce violations of the antidiscrimination statutes and dependent on the actions of private parties to enforce the law. Before 1972, employers would "shrug[] off the [EEOC's] entreaties" in "cases posing the most profound consequences" because of "the unlikelihood of the parties suing them." H.R. Rep. No. 238, 92d Cong., 1st Sess. 9 (1971). Under

the court of appeals' decision, an employer, by the simple act of attaching arbitration language to an employment application, can undo Congress's decisions in 1972 and 1991 to provide the EEOC with full enforcement authority in court, including the authority to vindicate the public interest by seeking and recovering the entire array of statutory remedies.

D. There Are No Other Countervailing Policy Considerations That Counsel Against Allowing The EEOC To Obtain The Full Range Of Statutory Remedies

1. Adopting the EEOC's position in this case would not lead to an impermissible double recovery for the victims of discrimination. As this Court explained in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 n.14 (1974), "in cases where the employee has first prevailed [in arbitration], judicial relief can be structured to avoid * * * windfall gains" that the employee would obtain through "duplicative recoveries." See also *General Tel.*, 446 U.S. at 333 (stating that it "goes without saying that the courts can and should preclude double recovery by an individual"). Thus, although the damages sought by the EEOC to vindicate the public interest in eradicating discrimination are paid over to the individual, there is no risk that the individual will receive an impermissible windfall. The EEOC is free to pursue its claim for victim-specific remedies, but a court may "adjust the relief accordingly" (*ibid.*) if the individual for whom the EEOC seeks such remedies has already recovered monies in the arbitral forum.[13]

[13] This case does not present any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action. The availability of relief in such cases would require resolution of questions concerning whether victim-specific relief would result in a double recovery, whether victim-specific relief is "appropriate" under 42 U.S.C. 2000e-5(g)(1) after the victim has satisfied his own claim through litigation or settlement, and whether principles of res judicata would bar an award of victim-specific relief under a particular statutory scheme and set of facts. In cases brought by the EEOC, courts of appeals have relied on principles of res judicata (in litigated or arbitrated cases) or mootness (in settled cases) to bar the EEOC from obtaining victim-specific relief after litigation or settlement of the victim's claims. See, *e.g.*, *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993) (ADEA case; res judicata); *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) (ADEA case; res judicata); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (Title VII case; mootness); but cf. *United States Steel Corp.*, 921 F.2d at 494 n.4 (noting distinctions between ADEA enforcement scheme and scheme applicable to Title VII and ADA cases). In this case, Baker has neither litigated nor settled his individual claim. Accordingly, the question presented is not one of res judicata or mootness, but rather whether Baker's mere choice of an arbitral forum for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action. See *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 463 (6th Cir. 1999) (distinguishing cases involving "a prior suit" or "a prior arbitration" that "raised or resolved the issues raised in the EEOC's complaint," in holding that a mere agreement to arbitrate does not preclude the EEOC from suing in its own name and recovering victim-specific remedies).

2. The court of appeals' rule is not supported by considerations of judicial economy and efficiency. If the EEOC is permitted to obtain in a single action both victim-specific relief and any general injunctive relief to which it is entitled (as Title VII provides), the complainant may choose to forego the arbitral forum altogether.[14] If, however, the EEOC cannot obtain

[14] The Second Circuit in *Kidder Peabody* erred in stating that an employee in a case like this can wait for the EEOC to prevail in its lawsuit and then bring the employee's own claim for victim-specific remedies in arbitration. 156 F.3d at 303 ("If the EEOC is

victim-specific relief (as the court of appeals held), parallel proceedings likely would be necessary; the EEOC generally litigates (and is perhaps limited to litigating, see note 7, *supra*) in court, while the individual would be required to pursue the arbitral forum to obtain any victim-specific relief. This Court in *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302, 1313 (2001), noted that "litigation costs" can be "compounded" by "the necessity of bifurcation of proceedings" into parallel arbitral and judicial cases. The court of appeals' decision would make those extra costs virtually inevitable.

3. Nor is it anomalous that, under the approach advocated by the EEOC, the EEOC will be able to recover victim-specific remedies that could not be recovered in a private lawsuit initiated by the victim herself. That result flows logically from the dual enforcement structure of the antidiscrimination statutes, as this Court recognized in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, this Court held that an employee could be required to arbitrate a claim of discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* In reaching that conclusion, this Court stated that it was "unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA." 500 U.S. at 28.

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successful, the employee could pursue back pay and liquidated damages through arbitration armed with a federal court's finding of discrimination, which certainly would have collateral estoppel effect in the arbitral proceeding."). By the time the EEOC has prevailed, the employee is very likely to be beyond the time limit for bringing his own claim, and the employee would therefore likely be precluded from capitalizing on the EEOC's lawsuit in that way.

The Court explained that "[a]n individual ADEA claimant subject to an arbitration agreement [is] still * * * free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Ibid.* Such a charge triggers the EEOC's statutory enforcement responsibilities, including its right to file a public enforcement action and to obtain victim-specific relief. *Gilmer* thus suggests that a private agreement to arbitrate affects private rights only; it has no impact on the public enforcement role of the EEOC.

4. In other contexts as well, the Court has recognized that the public interest in obtaining victim-specific remedies is sufficient to justify a government suit that seeks only such remedies (and does not even seek injunctive relief), even when the victim himself would be entirely disabled from bringing the suit. In *Board of Trustees of the University of Alabama* v. *Garrett*, 121 S. Ct. 955 (2001), this Court held that the Constitution bars a private individual from suing a nonconsenting state employer for money damages under Title I of the ADA. That constitutional bar is based on "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Notwithstanding that fundamental bar, however, the Court recognized that a public enforcement action seeking the very same money damages denied to a private plaintiff would not be barred. As the Court stated, the standards of Title I of the ADA "can be enforced by the United States in actions [against State employers] for money damages." 121 S. Ct. at 968 n.9. Accord *Alden* v. *Maine*, *supra* (Fair Labor Standards Act).

Garrett and *Alden* provide a compelling rejoinder to the court of appeals' concern that allowing the EEOC to sue for victim-specific remedies in cases of this nature will result in an impermissible circumvention of the "federal policy embodied in the FAA." J.A. 20. In the context of state sovereign immunity, permitting the federal action to obtain victim-specific remedies while prohibiting private suits against States simultaneously respects state sovereignty and the federal law being enforced. For similar reasons, permitting an EEOC action for victim-specific remedies while prohibiting private suits by parties who agreed to arbitrate respects both the binding nature of arbitration agreements on the parties and the federal antidiscrimination laws.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission can override an individual employee's contract to arbitrate all employment-related claims by bringing an action in court to recover monetary damages and equitable relief specifically for the individual employee?

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STATEMENT OF THE CASE

Respondent Waffle House, Inc. ("Waffle House") employed Eric Scott Baker as a grill operator. At the time of his hire and as part of the application process, Baker agreed to arbitrate all employment disputes he may have against Waffle House. Waffle House terminated Baker's employment in September 1994.

Baker filed an administrative charge with Petitioner, the Equal Employment Opportunity Commission ("EEOC"). He alleged in the charge that Waffle House discriminated against him based on an alleged disability, in violation of the Americans With Disabilities Act of 1990, 42 U. S. C. § 12101, *et seq.* (2000) ("ADA"). EEOC found reasonable cause to believe Waffle House discharged Mr. Baker in violation of the ADA. EEOC neither investigated whether, nor concluded, there was reasonable cause to believe that Waffle House may have discriminated against any other employee.

After EEOC and Waffle House were unable to successfully conciliate Baker's charge, on September 6, 1996, EEOC filed a complaint against Waffle House in the United States District Court for the District of South Carolina (J.A. at 36-41). EEOC alleged in the complaint that Waffle House discriminated against Baker based on an alleged disability in violation of the ADA. EEOC sued not only for injunctive relief, but also for a panoply of remedies on behalf of Baker, including reinstatement, back-pay, as well as compensatory and punitive damages.[1]

The United States Court of Appeals for the Fourth Circuit held Baker's arbitration agreement barred EEOC's

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[1] Section 12117(a) of the ADA expressly incorporates the "powers, remedies and procedures set forth in" Title VII of the Civil Rights Act of 1964. Therefore, references in this brief to Title VII's enforcement procedures apply to the ADA as well.

pursuit of individual-specific relief on his behalf in the district court. The court of appeals found EEOC is free to proceed with its district court claim against Waffle House for broad injunctive relief to vindicate its role of preventing discrimination. However, the court went on to hold Baker must pursue *in arbitration* the individual remedies EEOC sought in court, to satisfy the requirements of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (2000) ("FAA"), and the strong federal policy favoring arbitration expressed therein.

A. FACTUAL BACKGROUND

On June 23, 1994, Baker applied for work at a Waffle House restaurant located in Columbia, South Carolina. He filled out and signed a Waffle House employment application that contained a mandatory arbitration provision on the first page:

> The parties agree that *any dispute* or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

(J.A. at 59 (emphasis added)).

As part of the hiring process, Baker met with a series of Waffle House managers, starting with Waffle House's District

Manager, Lee Motlow. Motlow offered Baker a job at the Columbia restaurant, but Baker declined. Motlow referred Baker to Mike Bradley, the manager of a different Waffle House restaurant in West Columbia, South Carolina. Bradley and Baker met at the West Columbia restaurant and agreed on a date for Baker to start work (J.A. at 43).[2]

On August 10, 1994, Baker began working for Waffle House as a grill operator (*Id.*). Apparently due to a change in his medication, Baker suffered a seizure at work on August 26, 1994 (J.A. at 44). Waffle House discharged Baker on or about September 5, 1994 (J.A. at 44-45).

Baker did not initiate arbitration proceedings pursuant to his agreement, and has never argued that the arbitration agreement either is invalid or does not apply to his discrimination claim under the ADA.

B. PROCEDURAL HISTORY

Baker filed a timely charge of discrimination with EEOC, alleging that his discharge violated the ADA. Under a work-sharing agreement, EEOC deferred Baker's charge to the South Carolina Human Affairs Commission ("SCHAC") for investigation.

SCHAC concluded there did not appear to be reasonable cause to find that Baker's discharge was discriminatory. SCHAC transmitted to EEOC its disposition of the charge for review. EEOC then conducted its own investigation of Baker's claim and, contrary to SCHAC's determination, concluded there was "reasonable cause" to believe that Baker's discharge violated the ADA. After an unsuccessful

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[2] This description is taken from the detailed factual recitation EEOC offered in its standard interrogatory responses made pursuant to S.C. Dist. Ct. Local Rule 26.03 (J.A. at 43). These mandatory interrogatory responses "may be relied upon and used in the same manner as discovery responses obtained under the Federal Rules of Civil Procedure." *Id.* Rule 26.02.

attempt at conciliation, EEOC issued a Notice of Conciliation Failure.

On September 9, 1996, EEOC filed its complaint against Waffle House in the United States District Court for the District of South Carolina. EEOC alleges Waffle House violated the ADA by terminating Baker's employment because of an alleged disability (J.A. at 36).

EEOC states in the complaint it seeks individual-specific remedies on behalf of Baker, including reinstatement, back-pay, compensatory and punitive damages (J.A. at 38-40). The complaint, however, is wholly devoid of any allegations regarding the existence of any similarly situated individuals, or the existence of some unlawful policy or practice. EEOC in its prayer for relief does not request equitable relief on behalf of anyone except Baker (J.A. at 39-40).

In response to the complaint, Waffle House filed a petition to compel arbitration and to stay proceedings pursuant to the FAA (J.A. at 2, 10). Waffle House also filed a motion to dismiss the action under Fed. R. Civ. P. 12(b)(6), maintaining that all claims asserted in the litigation must be arbitrated under Baker's agreement to arbitrate contained in the employment application (*Id.*).

The magistrate judge to whom the case was referred issued a Report and Recommendation, concluding that Waffle House's petition to compel arbitration should be granted, and EEOC's action should be stayed pending arbitration (Pet. App. at 37a). EEOC then filed objections to the magistrate judge's Report and Recommendation (J.A. at 3).

On March 24, 1998, the district court entered an order rejecting the magistrate judge's Report and Recommendation (Pet. App. 30a). The district court held that the terms and conditions of Baker's employment with Waffle House did not include the arbitration agreement contained in the employment application. The district court found significant that Baker had submitted his employment application at one Waffle House restaurant, but later was hired to work at a

different Waffle House. Accordingly, the district court concluded no arbitration agreement existed between Waffle House and Baker, and it refused to compel arbitration, stay the litigation, or dismiss the complaint (Pet. App. 33a-34a).

On March 31, 1998, Waffle House timely appealed the district court's order to the United States Court of Appeals for the Fourth Circuit (J.A. at 4). The court of appeals heard oral argument on March 1, 1999, and issued its opinion on October 6, 1999 (J.A. at 5), affirming in part and reversing in part the district court's decision (J.A. at 7). EEOC petitioned for rehearing and rehearing *en banc* (J.A. at 6). The court of appeals denied that petition on January 14, 2000, and issued its mandate on January 24, 2000 (Pet. App. at 35a; J.A. at 6).

EEOC then petitioned this Court for a Writ of Certiorari on May 15, 2000. EEOC limited its request for review to the court of appeals's limitation on EEOC's ability to seek "make-whole" relief in a judicial forum on behalf of Baker. This Court granted EEOC's petition on March 26, 2001.

C. THE OPINION BELOW

The court of appeals first concluded Baker's employment application, which contained the arbitration agreement, was an enforceable contract. The court held the arbitration agreement, contained in the employment application Baker signed, bound him without regard to the specific Waffle House restaurant in which he ultimately began working (J.A. at 11-13).[3]

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[3] EEOC concedes for purposes of this Court's review that Baker's arbitration agreement with Waffle House is valid and enforceable under the FAA (*see* Pet. for Cert. at 10 n.2; Pet. Brf. at 10). While the validity of the agreement is not open to serious dispute, *see Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001), Waffle House agrees with EEOC that the issue of the enforceability *vel non* of the arbitration agreement is not before this Court.

The court of appeals then considered whether EEOC should be allowed to do what Baker could not: sue Waffle House in court for damages payable to Baker, as well as other individual-specific relief. In brief, the court of appeals ruled EEOC could not seek individual-specific remedies on behalf of Baker, because he agreed such remedies were available to him only through arbitration. The court of appeals held EEOC could maintain its action against Waffle House, but only for broad-based injunctive relief (J.A. at 13-24).

In reaching its decision, the court of appeals acknowledged EEOC's important role in protecting the public from employment discrimination (J.A. at 13-14). The court also recognized, however, that in light of Baker's arbitration obligation, EEOC's effort to vindicate Baker's individual interests in court conflicted with the FAA and the strong federal policy favoring arbitration (J.A. at 20).

To resolve the possible tension between co-existing statutes (here, the FAA and ADA), the court of appeals applied traditional principles of statutory interpretation. In doing so, the court struck a balance between the respective federal statutes endorsing EEOC's public interest role and Baker's enforceable agreement to arbitrate:

> When an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to give that contract effect in order to favor the arbitration mechanism for dispute resolution. To permit EEOC to prosecute in court Baker's individual claim–the resolution of which he had earlier committed by contract to the arbitral forum–would significantly trample this strong policy favoring arbitration. Because Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done for himself. The EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts but, as we conclude herein, it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims. Although the EEOC acts in the public interest, even when enforcing only the charging party's claim, the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief to attack discrimination more generally.

(J.A. at 20-21). Having identified the policies underlying both the ADA and Title VII, 42 U.S.C. § 2000e, *et seq.* (2000), the court harmonized the EEOC's enforcement role thereunder with the FAA:

> *When the EEOC seeks make-whole relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court* because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

(*Id.* at 20-21 (emphasis added)).

Accordingly, the court of appeals affirmed the district court's order denying Waffle House's petition to compel arbitration and refused to compel EEOC to arbitrate Baker's claim. The court, however, reversed the district court's order denying Waffle House's motion to dismiss EEOC's claims for individual-specific relief on behalf of Baker. (J.A. at 23-24).

SUMMARY OF ARGUMENT

A. A fundamental, threshold issue is uncontested in this Court: Baker and Waffle House entered into a valid and enforceable arbitration agreement under the FAA, which encompasses the ADA claim at issue in this case (*See supra* n.3; Pet. Br. 10, 24).

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute thus embodies a liberal federal policy favoring arbitration repeatedly recognized in this Court's precedents. This Court further has held, as recently as last Term, that civil rights claims properly may be resolved by resort to arbitration without undermining enforcement of the civil rights laws. *See Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001) (holding that failure to adopt clear rules providing for enforcement of arbitration agreements would result in "breeding litigation from a statute that seeks to avoid it" (citation omitted)).

B. The Fourth Circuit correctly harmonized the text of the FAA and the federal policy favoring arbitration with Title VII and the ADA, and the EEOC's enforcement role under those statutes.

Because EEOC seeks to circumvent an arbitrable claim by seeking individual-specific relief, the burden is on the agency to demonstrate that another statute trumps the clear meaning of the FAA. Nothing in either the ADA or Title VII states, directly or indirectly, that EEOC can proceed in this fashion.

Instead, either of two textual readings is superior to that proffered by EEOC. Both support the judgment below. First, Title VII authorizes EEOC to secure only "appropriate" relief. 42 U.S.C. § 2000e-5(g)(1). When an employee has validly agreed to pursue his claim through arbitration, it cannot fairly be said to be "appropriate" to let a third-party recover on his behalf and *on the identical claim*. Second, because neither

Title VII nor the ADA speak directly to this circumstance, those statutes and the FAA should be read *in pari materia* to favor arbitration. This Court has confronted even more direct conflicts between remedial legislation and the FAA on several occasions, repeatedly adopting a construction that favors arbitration. The same result is appropriate here because Title VII and the ADA expressly encourage the use of alternative dispute resolution mechanisms, including arbitration. The EEOC's contrary view–which rests substantially on its reading of the 1972 amendments to Title VII–is incorrect: the amendments, and decisions interpreting them, make clear that the EEOC is not the exclusive advocate of the public interest.

Permitting EEOC to secure individual-specific relief, including money damages, on an arbitrable claim would contravene the purposes of the FAA–particularly, Congress' goal to foster arbitration. If EEOC's view is accepted, an employer can never have confidence *ex ante* that its agreement with employees to arbitrate will have force, for EEOC can always file an action alleging the same claims to secure individual-specific relief for the same employees.

Moreover, employers would be faced with identical proceedings in multiple fora. The inevitable delays and increased expenses attendant to this circumstance would subvert the FAA's and Title VII's salutary policies in favor of expeditious relief. Further, the obvious danger that a court and arbitrator will review identical facts but reach inconsistent results will derogate not only the FAA and anti-discrimination statutes, but also bedrock principles of finality and consistency essential to the orderly resolution of civil disputes.

In short, EEOC's position, if adopted, would undermine the arbitration programs the nation's employers have instituted, to the ultimate detriment of both employers and employees. Such a result is not acceptable under the FAA or Title VII for that matter.

EEOC's complaint seeks, among other things, reinstatement of Baker, back pay, compensatory damages, and punitive damages. Any recovery on that claim by EEOC would go directly to Baker. Baker, however, agreed to arbitrate these claims.

EEOC thus seeks to do what Baker could not: proceed directly in federal court to recover for Baker precisely the same remedies that Baker agreed to pursue only through arbitration. Yet, EEOC in seeking relief exclusively on behalf of Baker acts as his representative and, therefore, takes Baker as it finds him. A plaintiff standing in Baker's shoes (such as EEOC) cannot proceed directly in federal court on a claim where the agency seeks to recover for Baker precisely the monetary and other individual-specific remedies that Baker has agreed to pursue only through arbitration. Although an unrelated third-party generally is not bound by an arbitration agreement to which it did not agree when it is seeking relief on behalf of itself, this is a very different circumstance. The federal courts consistently refuse to allow circumvention of arbitration agreements through litigation that, while nominally brought by a third party, is in reality for the benefit of the party who has agreed to arbitrate.

EEOC's enforcement role therefore must be reconciled with the text of the FAA as well as the strong federal policy favoring arbitration. The court of appeals did just that. The court correctly decided EEOC is precluded by the FAA insofar as the agency seeks individual-specific relief on behalf of Baker on a claim that he agreed to arbitrate. EEOC remains free to pursue other claims such as for injunctive relief against discrimination in the workplace. As the Court stated in *Gilmer v. Interstate/Johnson Lane Corporation*, "arbitration agreements will not preclude the EEOC from bringing actions seeking classwide and equitable relief." 500 U.S. 20, 32 (1991).

EEOC's statutory right to litigate claims on behalf of individual employees cannot bear the weight the agency places upon it. Even EEOC admits its absolutist

interpretation is erroneous. For example, EEOC may not continue to seek individual monetary remedies if the employer and employee settle their claims. In fact, individuals' unilateral action may limit the range of damages EEOC may seek on their behalf in a number of circumstances: courts impose such limitations when individuals fail to mitigate damages, when an employer discovers "after-acquired" evidence of misconduct, or when individuals refuse to waive the psychotherapist-patient privilege. EEOC does not, and could not, claim exemption from the courts' imposition of these restrictions.

EEOC's position neither is compelled nor even substantially supported by *General Telephone Company v. EEOC*, 446 U.S. 318 (1980). Not only was *General Telephone* decided before a significant portion of this Court's FAA jurisprudence and the Civil Rights Act of 1991, but it also does not speak to any of the issues now before the Court. The fact *General Telephone* states, in the context of class actions under Fed. R. Civ. P. 23, that EEOC does not act "merely" as a surrogate for individual claimants, 446 U.S. at 326, does not relate to the issues in this case. There is no serious dispute at all that, as to the individual-specific remedies (including damages) at issue here, EEOC is seeking to recover in court solely on behalf of Baker on a claim that Baker himself agreed to arbitrate.

EEOC's policy arguments are no more persuasive. Its claim that actions of this sort are essential to its mission of pursuing civil rights violations is contradicted by the empirical record: EEOC participates in less than two percent of all employment-discrimination litigation. Also, it is unlikely that Congress intended to strip the individual of control over his own claim in the manner proposed by EEOC, which maintains that the employee will not be permitted to participate in any respect in its lawsuit.

EEOC's discussion of the remedies available under Title VII and the ADA does not undermine the Fourth Circuit's judgment. Monetary remedies are indeed important, but the

relevant point is that they are available to the employee in arbitration. This Court has recognized that such individual actions are an important means of furthering the civil rights laws, including through arbitration. EEOC itself has the unquestioned authority to secure equitable relief including injunctions, as well as monetary sanctions if the employer fails to comply. Indeed, the better reading of Title VII is that EEOC may intervene in the arbitration. In any event, if contrary to the plain statutory meaning, Congress intended to permit EEOC to pursue individual-specific remedies in these circumstances, it is free to amend the statutory language accordingly.

C. At bottom, EEOC simply seeks to pursue here its long-standing, deeply felt policy against arbitration of employment disputes. Congress, however, has made a contrary choice. Disputes about the wisdom of that choice are not to be resolved in this forum.

ARGUMENT

A. THE PLAIN TEXT OF THE FEDERAL ARBITRATION ACT AND THE CLEAR CONGRESSIONAL POLICY FAVORING ARBITRATION COMPELLED THE FOURTH CIRCUIT'S DECISION

Congress enacted the FAA in 1925 to reverse a longstanding judicial hostility towards arbitration that American courts inherited from the English common law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991. The purpose for its passage was to ensure judicial enforcement of privately made agreements to arbitrate. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The FAA accordingly provides that written agreements to arbitrate covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Dean Witter Reynolds, Inc.*, 470 U.S. at 218.

1. The Federal Arbitration Act Evinces a Strong Federal Policy in Favor of Arbitration

This Court has recognized that the FAA manifests a "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (internal quotation omitted). The FAA's command leaves no room for the exercise of discretion by a court. Indeed, it mandates enforcement of a valid agreement to arbitrate that is subject to the FAA. *See Dean Witter Reynolds*, 470 U.S. at 218. [4]

Last Term, in *Circuit City Stores, Inc. v. Adams*, this Court resolved any doubt about its endorsement of arbitration in the context of employment disputes:

> [T]here are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. . . . The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's

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[4] Thus, when ruling on a petition to compel arbitration under Section 4 of the FAA, a court may consider only two questions: (1) whether the parties have executed an arbitration clause covering the dispute in issue; and (2) whether one party has refused to abide by the arbitration clause. If both questions are answered in the affirmative, the court must grant the petition. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

> proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.' *The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law*; as we noted in Gilmer, 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'

121 S. Ct. 1302, 1313 (2001) (emphasis added) (internal citations omitted).

There is no dispute Baker and Waffle House entered into an agreement to arbitrate that is enforceable under the FAA. *See supra* n.3. The parties likewise agree Baker has no judicial remedy available to him regarding his discrimination claim (*See* Pet. Brf. at 25). The FAA requires enforcement of such agreements.

But EEOC asserts it may do what Baker cannot: proceed in court for damages payable to Baker, without regard to Baker's success *vel non* in arbitration. This position creates tension between the FAA and the anti-discrimination statutes. The respect that the court of appeals afforded to Baker's arbitration agreement and the anti-discrimination statutes is fully in accord with this Court's precedents.

2. This Court Repeatedly Has Upheld the FAA's Strong Policy Favoring Arbitration of Claims Under Federal Employment Discrimination Statutes and Other Remedial Federal Laws

It is far too late in the day for EEOC to insist individuals may not effectively vindicate their rights in arbitration, or that arbitration somehow undermines the agency's power to enforce the civil rights laws. On numerous occasions, the Court has been asked to exempt a variety of federal statutory

claims from the FAA's pro-arbitration policy. In each case before it, the Court has examined the relevant statutory text and the Congressional policy underlying the statute, balanced the text and policy against the strong federal interest in enforcing arbitration agreements, and required arbitration. *See, e.g., Gilmer*, 500 U.S. 20 (1991). The Court repeatedly has found that claims under statutes furthering broad remedial goals–even under those that confer "private attorney general" obligations on individuals–are appropriate for submission to mandatory arbitration. In fact, to Waffle House's knowledge, there is no federal statute the Court has found *per se* inappropriate for arbitration.

Gilmer is a compelling example of the Court's jurisprudence in this area. The Court for the first time addressed mandatory arbitration of federal discrimination claims outside of the collective bargaining context. The Court reconciled the FAA with the Age Discrimination in Employment Act, 29 U.S.C. §. 621, *et seq.* (2000) ("ADEA"), a statute EEOC also enforces. *Id.* § 626(1). The Court first noted it was Gilmer's burden to show that Congress intended to prohibit a waiver of a judicial forum for his ADEA claim. Any such intention would "be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." *Gilmer*, 500 U.S. at 26. The Court was careful to note, however, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.*

The Court held Gilmer was required to arbitrate his ADEA claim, as Gilmer failed to demonstrate a contrary Congressional intent. *See id.* at 35. The Court also found an employee's agreement to resolve ADEA claims in arbitration would fulfill both the individual and the critical societal functions of the ADEA. *See id.* at 27-28 ("We do not perceive any inherent inconsistency between [the ADEA's] policies, however, and enforcing agreements to arbitrate age discrimination claims.").

The Court also endorsed private arbitration of antitrust claims in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Although the Court recognized the significant public interest aspects of the Sherman Antitrust Act, it recognized the private plaintiff is akin to a private attorney general, assigned a central role in enforcing the antitrust laws. *Id.* at 635.

After deciding *Mitsubishi*, the Court embraced mandatory arbitration of claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); the Securities Act of 1933, *Rodriguez De Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989); and, as noted above, the Age Discrimination in Employment Act, *Gilmer*, 500 U.S. 20.

B. THE COURT OF APPEALS CORRECTLY HARMONIZED THE TEXT AND POLICIES OF THE FEDERAL ARBITRATION ACT, TITLE VII, AND THE ADA

The court of appeals struck an appropriate balance between EEOC's public interest mission and the federal policy favoring arbitration. The court's resolution is consistent with this Court's jurisprudence involving the interpretation of co-existing statutes, including the FAA, so as to give effect to Congressional intent. The decision of the court below also fully protects EEOC's legitimate interest in protecting the public interest in a discrimination-free workplace. At the same time, the decision furthers the strong national interest in the enforcement of arbitration agreements.

1. The Court of Appeals Properly Applied Traditional Principles of Statutory Construction Consistent With *Gilmer* and Other Cases

This Court often has stated courts are "not at liberty to pick and choose among congressional enactments, and when

two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pitt. & Lake Erie R.R. Co. v. Ry. Lab. Execs. Ass'n*, 491 U.S. 490, 510 (1989); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). The Court gives effect to each federal statute involved in a case, if it can do so while preserving their history and purpose. *Id.* at 550. This Court also does not read sections of a statute in isolation. Rather, the Court looks "to the provisions of the whole law, and to its object and policy." *Richards v. United States*, 369 U.S. 1, 11 (1962); *see also Circuit City*, 121 S. Ct. at 1311 ("We must, of course, construe the 'engaged in commerce' language of the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose.").

The Court applied these principles in *Gilmer*, easily harmonizing the FAA with the ADEA, and giving force to the agreement between the employer and employee to arbitrate the employee's claim. *See Gilmer*, 500 U.S. at 27-33. This Court has applied these tenets in other contexts as well, *see, e.g., Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970) (inferring exception to Norris-LaGuardia Act's absolute prohibition against enjoining labor disputes to ensure certain strikes may be enjoined under Section 301 of the Labor Management Relations Act), including cases involving the FAA, *see, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (applying FAA to arbitration under Carriage of Goods By Sea Act).[5]

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[5] The anti-injunction provision of the Norris-LaGuardia Act reads:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent

2. The FAA and Title VII Are "Capable of Co-existence" and, Therefore, Both Must Be Given Effect

Nothing in the text or policy of the FAA or Title VII (or the ADA for that matter) creates an "inherent conflict" that would preclude this Court from giving full effect to both federal statutes. *See Gilmer*, 500 U.S. at 26.[6] On the contrary, like the ADEA, Title VII readily accommodates this Court's "healthy regard" for the FAA's pro-arbitration policy.

a) EEOC, Like Any Plaintiff in an ADA or Title VII Case, Is Limited to Recovery of "Appropriate Relief," as Determined by a Court

EEOC is wrong to argue that precluding it from obtaining individual-specific remedies is contrary to Title VII's enforcement provisions. The agency contends Title VII "embodies a congressional policy that there can be a strong public interest in obtaining each of the forms of relief authorized by statute and *a congressional delegation to the EEOC–not the courts*–of the authority to decide when the public interest warrants bringing a public enforcement action to obtain that relief" (Pet. Brf. at 27 (emphasis added)). EEOC also argues that "Congress gave [it] complete control over the relief that it is entitled to seek . . ." (Pet. Brf. at 18; *see also id.* at 17) (explaining that Title VII "grants the EEOC the right to obtain *all* statutory remedies in any action that it brings") (emphasis added).

Nothing in the text of Title VII (or the ADA) supports EEOC's argument. On the contrary, the text of Title VII

> injunction in any case involving or growing out of any labor dispute....

29 U.S.C. § 104 (2000).

[6] The ADA incorporates Title VII's enforcement provisions. *See supra* n.1.

supports the Fourth Circuit's decision. Like the ADEA, Title VII provides for concurrent jurisdiction in federal and state court. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 825 (1990) (holding Title VII provides for concurrent jurisdiction).[7] A statute's authorization of concurrent jurisdiction is consistent with permitting arbitration. *See Gilmer*, 500 U.S. at 29.

Moreover, Title VII specifically authorizes the *courts*, not EEOC, to determine the "appropriate" relief, if any, to which the agency may be entitled in a lawsuit.[8] The Civil Rights Act of 1991, which expanded available remedies under the ADA and Title VII, is completely silent as to EEOC's power. *See* 42 U.S.C. § 1981a(b)(1) (2000) (stating that complaining parties "may recover" compensatory and punitive damages).

In sum, EEOC can point to nothing in the text of Title VII or the ADA that conflicts with the FAA. These statutes may, and do, co-exist peacefully.

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[7] *See* 42 U.S.C. § 2000e-5(f)(3) ("Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.").

[8] Section 706(g)(1) of Title VII provides, if there is a finding of discrimination:

> the *court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief *as the court deems appropriate*.

42 U.S.C. § 2000e-5(g)(1) (emphasis added).

b) This Court in *Gilmer* Interpreted the FAA and an Anti-Discrimination Statute to Ameliorate Potential Conflicts Between Them

Like Title VII and the ADA, the ADEA is intended to eliminate discrimination in the workplace and, therefore, serves important societal functions. *See McKennon v. Nashville Banner Publg. Co.*, 513 U.S. 352, 358 (1995). Several of the ADEA's enforcement provisions suggest Congress provided for relief only in court; indeed, none expressly authorize arbitration.[9] Yet, the Court stated in *Gilmer*, Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims even in the recent amendments to the ADEA. If Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history." *Id.*, 500 U.S. at 29. The Court found no such Congressional intent, *id.* at 35, upheld the FAA's policy, and required Gilmer to arbitrate his ADEA claim.[10]

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[9] *See* 29 U.S.C. § 626(b) ("In any action brought to enforce this Act the *court* shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act . . . .") (emphasis added); *id.* at § 626(c)(1) ("Any person aggrieved may bring a civil action *in any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of this Act . . . .") (emphasis added); *id.* at § 626(c)(2) ("In an action brought under paragraph (1), *a person shall be entitled to a trial by jury* of any issue of fact in any such action . . . .") (emphasis added).

[10] Similarly, this Court in *McMahon* ordered arbitration of claims brought under both the Securities Exchange Act of 1934 and RICO, even though both statutes are silent about arbitration and appear to authorize jurisdiction in "court" alone. *See* 15 U.S.C. § 78aa (2000) ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of this title . . . and of any and all suits in equity and actions at law . . . ."); 18 U.S.C. § 1964(c) (2000) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . .").

c) The FAA Is Consistent With the ADA as Well as Title VII and the 1972 and 1991 Amendments Thereto

EEOC heavily relies on the 1972 amendments to Title VII as proof that the court of appeals erred in its decision below. EEOC's interpretation of the 1972 amendments is wrong. Moreover, the ADA and the 1991 amendments to Title VII support the decision of the court below.

(1) *The ADA and the 1991 Amendments to Title VII Encourage Arbitration*

The ADA expressly encourages the use of arbitration, rather than litigation, to resolve claims under the statute: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, *is encouraged to resolve disputes arising under this Act.*" 42 U.S.C. § 12212 (emphasis added). This express Congressional declaration can only be interpreted as encouraging the resolution of ADA claims through arbitration or a means other than court litigation (regardless of whether EEOC or an individual is the plaintiff). *See, e.g., Bercovitch v. Baldwin School*, 133 F.3d 141, 150 (1st Cir. 1998) ("The meaning of [42 U.S.C. § 12212], far from evidencing an intention to preclude arbitration, can only be interpreted as favoring it.").

Congress enacted the ADA in 1990. A year later, Congress passed the Civil Rights Act of 1991, in which it amended Title VII, *inter alia*, to contain a similar endorsement of arbitration: "where appropriate and to the extent authorized by law, the use of arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title." *See* Pub. L. No. 102-166, § 118, 105 Stat. 1081 (1991). This provision, too, can only be construed as favoring increased arbitration of Title VII claims. *See, e.g., Desiderio v. NASD*, 191 F.3d 198, 204-05 (2d Cir. 1999) ("We conclude–as did the Third, Fourth and

Seventh Circuits–that the text of § 118 evinces a plain Congressional purpose of encouraging arbitration of Title VII claims and not one of precluding such arbitration."), *cert. denied*, 121 S.Ct. 756 (2001).

(2) *EEOC Misapprehends the Import of the 1972 Amendments to Title VII, Which Do Not Undermine the Fourth Circuit's Decision*

EEOC argues the 1972 amendments to Title VII establish its enforcement role in court as "paramount," and cannot be limited by the persons on whose behalf it sues (Pet. Brf. at 11, 28-30). The 1972 amendments in no way elevate EEOC to a higher plain than private litigants.

To be sure, Congress in 1972 was motivated to amend Title VII because it was dissatisfied with the progress of Title VII enforcement since the passage of the Civil Rights Act of 1964. It also is true that Congress authorized EEOC to bring actions in its own name to enhance enforcement of Title VII. But there is no merit whatsoever to EEOC's suggestion that Congress intended this new enforcement authority (1) to supplant the critical role of private litigation or (2) to change Title VII's core principle: that, wherever possible, discrimination charges are to be resolved *without* resort to litigation in court.

The 1972 amendments did not make EEOC the exclusive guardian of the public interest in enforcement of the civil rights laws. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 46 (1974) (holding that even after 1972 amendments, "the private right of action remains an *essential means* of obtaining judicial enforcement of Title VII" (emphasis added)). The critical importance of the individual enforcement action was confirmed in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). There, the Court considered whether the 180-day period set forth in Section 706(f)(1) of Title VII operated as a statute of limitations applicable to EEOC enforcement actions. Analyzing the legislative history of the 1972

amendments at length, the Court observed that preservation of the private right of action under Title VII was of utmost importance, notwithstanding EEOC's new enforcement authority. The Court noted the Senate Committee's view that the primary concern of the 1972 amendments was to protect the aggrieved person's option to seek a prompt remedy, and the purpose of the 180-day provision was to preserve the private right of action by an aggrieved person. *Id.* at 364 (citing Sen. J., 92nd Cong., 1st Sess., § 4(a) (1971); Sen. J., 92nd Cong., 1st Sess., § 3(c) (1971)).

The Court in *Occidental Life* also quoted from the Conference Report issued after final passage of the amendments. The Report clearly establishes that the intent of Section 706(f)(1), the section establishing EEOC's enforcement authority, was to retain private enforcement of Title VII:

> The retention of the private right of action, as amended, . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the provisions . . . allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution. It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC . . . However, as *the individual's rights to redress are paramount* under the provisions of Title VII it is necessary that all avenues be left open for *quick and effective relief*.

Id. at 365-66 (emphasis added).[11] *See also Nashville Banner*, 513 U.S. at 358 (holding that private litigants "vindicate[] both the deterrence and the compensation objectives" of the anti-discrimination statutes); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("Congress considered the charging party a private attorney general, whose role in enforcing the ban on discrimination is parallel to that of the Commission itself.").

In short, Congress left no doubt that its "paramount" concern was for individuals to obtain quick and effective relief from discrimination. There was no mention of placing EEOC's public enforcement role ahead of individual relief, or of any critical EEOC role in the development of precedent. The 1972 amendments, however, do express a clear concern that there be no impediment to the individual's expeditious recovery.

3. The Court of Appeals Correctly Gave Effect Both to the FAA and Title VII by Precluding EEOC From Seeking Individual-Specific Remedies on Behalf of Baker While Permitting It to Seek Broad Injunctive Relief in Court

The decision of the court of appeals authorizes complete relief under Title VII. EEOC may litigate in court to obtain a judicial declaration that an employer is violating the law. The agency also may obtain an injunction to correct unlawful practices and prohibit future violations (*see* J.A. at 21-22); *see also Gilmer*, 500 U.S. at 32 ("It should be remembered that arbitration agreements will not preclude EEOC from bringing

[11] The reference in this quote to "offices of the EEOC" apparently referred to the agency's administrative conciliation efforts, not EEOC enforcement actions. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 78 (1984) ("Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation.").

actions seeking classwide and equitable relief.").[12] The decision also allows Baker to pursue in arbitration all individual remedies available to him, which not only will vindicate his personal interest but also any public interest intended by Congress for such relief. *See Gilmer*, 500 U.S at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").[13]

Because complete relief is available, EEOC cannot successfully draw a parallel between the instant case and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), or *Alden v. Maine*, 527 U.S. 706 (1999). These decisions in no way conflict with the judgment of the court below. The Court is not called upon in the instant case to decide whether the FAA must yield to EEOC where, as in *Alden* and *Garrett*, the individual is without *any* remedy.[14]

[12] Contrary to EEOC's argument (Pet. Brf. at 22 n.7), EEOC also is free to seek intervention in arbitration. EEOC's contention the Fourth Circuit's decision is contrary to Title VII because the statute authorizes EEOC to appear only "in court" (*see id.* n. 8), is wrong. Nothing in Title VII or the ADA vests exclusive jurisdiction in the federal courts, or precludes EEOC from appearing in an arbitration proceeding. *See supra* nn.9, 10 and accompanying text.

[13] EEOC's argument that the Fourth Circuit's decision should be reversed because it will result in dual proceedings should be rejected (Pet. Brf. at 39-40). This result may be required to give effect to the FAA. *See, e.g., Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 (1983) ("[T]he relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement."). Indeed, it is *EEOC* that advocates independent, identical proceedings in court and arbitration, which belies its alleged concern. *See* discussion *infra* n.17 and accompanying text. In any event, given that EEOC litigates only a handful of cases per year, *see infra* nn.19, 20 and accompanying text, very few cases as a practical matter will involve an employee subject to arbitration *and* be an appropriate case for injunctive relief.

[14] In holding the Eleventh Amendment barred individuals' actions under the ADA against state governments, the Court recognized the

Here, as stated, Baker would be free to pursue in arbitration any remedies available to him.[15]

a) EEOC Effectively May Fulfill Its Public Interest Role by Seeking Injunctive Relief

EEOC attempts to minimize the importance of injunctive relief in discrimination cases. Indeed, it goes so far as to argue an injunction "can be a toothless sanction" (Pet. Brf. at 14). However, the courts that issue these injunctions believe otherwise. *See, e.g., Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) ("Injunctions are one of the law's most powerful weapons."): *Harmon v. Thornburgh*, 878 F.2d 484, 499 (D.C. Cir. 1989) (Silberman, concurring in part and dissenting in part) (stating an injunction is the most powerful civil order available to the judiciary).[16]

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federal government was authorized to sue states for money damages: "Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex Parte Young*, 209 U. S. 123 (1908)." *Garrett*, 121 S. Ct. at 968 n.9

[15] Indeed, it is highly unlikely this Court *ever* will be asked to balance the FAA's pro-arbitration policy against EEOC's role under the ADA, in a case where the Eleventh Amendment barred a public employee's lawsuit against a state. After all, if a state agreed to arbitration with its employee, it necessarily would have *consented* to litigation in that forum. *Cf. Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) (holding that a state may consent to suit and waive Eleventh Amendment immunity). Perhaps for this reason, EEOC does not cite to a single example of a state and its employees agreeing to arbitrate discrimination claims.

[16] EEOC quotes *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), for the proposition that "if employers faced only the prospect of an injunction order, they would have little incentive to shun practices of dubious legality" (*See* Pet. Brf. at 37). That quote must be viewed in context. In *Albermarle Paper*, the Court considered the appropriateness of a district court's failure to award backpay despite finding a violation of Title VII. In other words, the claimants were left with an injunction but no award of damages. That is not the case under the decision below. As stated, EEOC's request for an injunction, if appropriate, is relief in

Violations of Title VII injunctions are punishable as civil contempt, subjecting the violator to fines and other sanctions. *See, e.g., Local 28, Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 443-44 (1986) (upholding district court's imposition of monetary and other sanctions for civil contempt of Title VII injunction). Indeed, a violation of an injunction (or consent decree) obtained by EEOC retains sufficient "teeth" to justify significant sanctions. *See, e.g.*, U.S. Equal Employment Opportunity Commission, *Judge Slaps Wal-Mart with Major Sanctions for Violating Court Order in EEOC Disability Bias Case* (visited Ju'y 1, 2001) <http://www.eeoc.gov/press/6-14-01.html> (announcing district court's award of $750,200 in fines and other affirmative relief for contempt of consent decree); *cf. Sheet Metal Workers, supra*, 478 U.S. at 443-44 (upholding civil contempt fines).

EEOC complains it might not always be able to establish entitlement to an injunction (Pet. Brf. at 35-36). Again, by statute, EEOC will be entitled to injunctive relief only in "appropriate" cases as determined by a court. That EEOC may not always be able to satisfy a court it is entitled to injunctive relief provides no basis to challenge the Fourth Circuit's decision. *See Gilmer*, 500 U.S. at 28. ("Nothing in the ADEA indicates that Congress intended that EEOC be involved in all employment disputes.").

b) The Court of Appeals's Decision Promotes the Important Policy of Quick and Efficient Relief Under the FAA and Title VII

The resolution the court below reached will expedite relief for victims of discrimination. As discussed, Congress considered speedy relief to be a significant policy behind Title VII. *See Occidental Life*, 432 U.S. at 364-65; *EEOC v. Ford Motor Co.*, 458 U.S. 219, 221 (1980). The Court in *Ford*

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addition to Baker's ability to seek the full range of individual-specific remedies available under Title VII.

Motor interpreted the remedies provision under Title VII to further this important policy:

> The extended time it frequently takes to obtain satisfaction in the courts may force a discrimination claimant to suffer through years of underemployment or unemployment before being awarded the job the claimant deserves. Court delays, of course, affect all litigants. But for the victim of job discrimination, delay is especially unfortunate. *The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit.* . . . In this case, therefore, we must determine how best *to fashion the remedies* available under Title VII to fulfill this basic need.

458 U.S. at 221 (emphasis added).

By giving effect to Baker's arbitration agreement, the court below fashioned Title VII's remedies consistent with its policy favoring expeditious relief. One of arbitration's benefits is that it will proceed *and conclude* far quicker than litigation in court. *See Mitsubishi*, 473 U.S. at 628 (discussing "simplicity, informality, and expedition of arbitration").

In contrast, EEOC's position will needlessly delay resolution of employment discrimination claims and render arbitration agreements essentially a nullity when the agency brings suit. Here, for example, EEOC filed the instant action approximately two years after Baker was discharged. Even EEOC speculates an employee's right to arbitrate would end long before its lawsuit would conclude (Pet. Brf. at 39 n.14). Thus, despite Waffle House's and Baker's agreement to arbitrate, it would take years before the parties to that agreement achieved a final disposition of their dispute.

EEOC's position also will result in identical claims proceeding in dual fora. Under EEOC's view, Baker and the agency simultaneously could pursue a claim against Waffle House for the same relief. True, EEOC suggests the courts

effectively may limit double recovery, but that is only one of the flaws in the agency's approach. EEOC says nothing about the drastic increase in the cost of litigation to Waffle House–not to mention to the employee should he or she wish to arbitrate *and* intervene in EEOC's litigation.

The agency also is silent about the possibility a court and arbitrator would reach opposite conclusions in parallel cases based on identical facts.[17] Courts do not allow parallel litigation to proceed when it would frustrate the purpose of the FAA. *See, e.g., Harvey v. Joyce*, 199 F.3d 790, 796 (5th Cir. 2000) (imposing stay on non-party's parallel litigation where permitting it to proceed would render arbitration proceeding meaningless and frustrate the policy favoring arbitration). If EEOC's position were adopted, the lack of finality and danger of inconsistent results engendered thereby would undermine the integrity of not only the FAA but also the anti-discrimination laws. *Cf. Montana v. U.S.*, 440 U.S. 147, 153-54 (1979) (explaining policy of finality and avoiding inconsistent results in civil litigation). In short, EEOC's misreading of the FAA and Title VII would "breed[] litigation from [statutes] that seek[] to avoid it." *Circuit City*, 121 S. Ct. at 1313.

c) EEOC's Public Interest Role Does Not Foreclose an Individual From Seeking More Expeditious Relief Without Agency Involvement

EEOC takes the absolutist position that an individual's action cannot affect the scope of the agency's enforcement litigation. This argument is untenable. There are recognized circumstances under which an individual's conduct limits EEOC's enforcement authority. Furthermore, EEOC's contention that its enforcement litigation is completely

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[17] Indeed, EEOC apparently considers it an open question whether an individual's prior, adverse arbitration decision bars the agency's action under *res judicata* (*See* Pet. Brf. at 38-40 & nn.13-14).

independent of the claims asserted by individuals does not withstand scrutiny.

(1) *Individual Claimants' Actions Limit EEOC's Power to Seek Remedies on Their Behalf*

EEOC is not entitled to pursue relief on behalf of an individual who has agreed to forego such relief. *See Gilmer*, 500 U.S. at 28 (holding that disputes may be settled without EEOC's involvement) (collecting cases). Courts have recognized that EEOC "stands in the shoes" of the individual complainant with respect to that complainant's right to pursue individual relief. For example, in *EEOC v. Goodyear Aerospace Corporation*, the court concluded the individual claimant's settlement "rendered her personal claims moot." 813 F.2d 1539, 1542 (9th Cir. 1987). Accordingly, the court limited EEOC to seeking "injunctive relief to protect employees as a class and to deter the employer from discrimination." *Id.* at 1543; *see also Occidental Life*, 432 U.S. at 381 (Rehnquist, J., dissenting) ("Insofar as the EEOC seeks to recover backpay for individuals, it stands in the shoes of the individuals, and represents them in a suit the individuals would otherwise be entitled to bring."); *New Orleans Steam Ship Assoc. v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (holding the EEOC may challenge a transaction that was the subject of a prior private action only if EEOC seeks different relief); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975) (finding that a settling employee was not entitled to recover any additional private benefit such as back pay through EEOC action); *see generally EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (agreeing there is privity between the EEOC and individuals for whom it seeks individual benefits); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990).

Individual claimants may take unilateral actions apart from settlements that limit EEOC's potential remedies. The doctrines of "after-acquired evidence" or "unclean hands" may reduce back-pay liability, *see Nashville Banner*, 513 U.S.

at 360-63, as will an individual's unjustifiable failure to mitigate damages, *see Ford Motor*, 458 U.S. at 231-32 (holding employee's rejection of unconditional offer of employment limits back pay). And courts will deny an individual the recovery of emotional distress damages if he or she refuses to waive the psychotherapist-patient privilege. *See, e.g., Schoffstall v. U.S. Postal Serv.*, 223 F.3d 818 (8th Cir. 2000) (affirming dismissal of emotional distress claim where plaintiff refused to waive psychotherapist-patient privilege).

The employee's agreement to arbitrate is analogous to the individual's settlement of a discrimination claim, or other unilateral action the individual takes without EEOC's involvement. Just as the claimant's decision to settle a case waives the right to recover damages in court and *precludes EEOC from seeking such damages*, the employee's agreement to arbitrate also is a waiver of the right to seek damages in court. *See Gilmer*, 500 U.S. at 28 ("An individual ADEA claimant subject to an arbitration agreement . . . is not able to institute a private judicial action."). As such, the Fourth Circuit properly held EEOC is precluded from seeking damages in court where, as here, the alleged victim of discrimination agreed to arbitrate. *See Merrill Lynch, Pierce, Fenner & Smith v. Nixon*, 210 F.3d 814 (8th Cir. 2000) (holding that state fair employment agency precluded from seeking monetary remedies for discrimination where employee agreed to arbitration), *cert. denied*, 531 U.S. 958 (2000); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998) (holding EEOC precluded from seeking damages for discrimination where employee agreed to arbitration); *contra EEOC v. Frank's Nursery and Crafts*, 177 F.3d 448, 468 (6th Cir. 1998) (holding EEOC may proceed with separate action for individual relief despite employee's agreement to arbitrate discrimination claims).

Finally, EEOC cannot credibly argue it is immune from Baker's arbitration agreement merely because it was not a party thereto. First, Waffle House seeks not to bind EEOC to

arbitrate, but rather to give effect to its agreement with Baker. Second, "there are instances, and cases, where non-signatories to arbitration clauses may be equitably compelled to pursue their claims against a defendant in arbitration." *Lewis v. Haskell Co.*, 108 F. Supp. 2d 1288, 1293 (M.D. Ala. 2000) (quoting *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1534 (M.D. Ala. 1997) (collecting cases)). *See generally Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (presenting a list of common law contract and agency principles under which nonparties to arbitration clauses may be bound to arbitration). Indeed, a non-party to an arbitration agreement may be compelled to arbitrate in a variety of circumstances, *e.g.*, when the allegations against the party are based on the same facts and inseparable from claims against the non-party. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3rd Cir. 1993) (holding that a principal and agent should both be bound to an arbitration agreement entered into by one of them when charges against both are based on the same facts and are inherently inseparable). If non-parties to arbitration agreements may be held to arbitrate when their claims are intertwined, merely limiting EEOC's *remedies* in court when its claim is *identical* to the arbitrating party's is a restrained and fair resolution.

(2) *This Court's Decision in General Telephone Is Inapposite*

EEOC attaches great significance to *General Telephone Company v. EEOC*, 446 U.S. 318 (1980), where the Court decided the narrow issue of whether EEOC must satisfy the requirements of Fed. R. Civ. P. 23 when it brings a collective action. In essence, *General Telephone*'s holding is that EEOC need not satisfy the requirements of Rule 23 because it does not "*merely*" sue as a surrogate for the individuals on whose behalf it seeks relief. *Id.* at 326 ("These private-action rights suggest that the EEOC is not *merely* a proxy for victims of discrimination ....") (emphasis added).

EEOC extrapolates that statement into the proposition that, in an enforcement action, EEOC does not represent the charging parties on whose behalf it seeks relief, and it acts completely independently from individual claimants (Pet. Brf. at 17-19). Therefore, EEOC asserts, an individual cannot limit the scope of an EEOC action by entering into a private arbitration agreement (Pet. Brf. at 24-26).

General Telephone does not sustain EEOC's gloss. The Court's choice of the word "merely" is not as meaningless as EEOC's argument implies. Rather, it means the Court recognized EEOC fulfills two functions in an enforcement action: (1) a representative of the public interest, and (2) a representative of the individual victims of discrimination on whose behalf it sues. EEOC's reading of *General Telephone* is inconsistent with this Court's later decision in *Gilmer*, in which the Court expressly recognized individuals' rights to settle claims without EEOC's involvement. *See Gilmer*, 500 U.S. at 28.

Of course, *General Telephone* has nothing to do with arbitration at all, much less the interrelationship between the FAA and the statutes EEOC enforces. Moreover, *General Telephone*, decided in 1980, predates several of the Court's decisions under the FAA, including *Gilmer*, decided in 1991.[18] It also bears noting that *General Telephone* pre-dated the Civil Rights Act of 1991, wherein Congress specifically endorsed arbitration as a viable forum for resolving employment disputes. *See supra* p. 21-22. Moreover, Congress passed the Civil Rights Act of 1991 in part to enhance *private enforcement* of the statute. *See* H.R. Rpt. 102-40, part I, 75-77 (June 5, 1991) (*reprinted in* 1991 U.S.S.C.A.N. 539, 613-615). The House Committee Report "reaffirms the policy that unless discrimination victims can find lawyers to take their cases . . . the compelling public

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[18] Indeed, this Court first decided in 1986, six years after *General Telephone*, that arbitration of statutory claims could be compelled. *See Mitsubishi*, 473 U.S. at 624-26.

interest in eliminating discrimination cannot be served." *Id.* at 76-77.

In any event, the Fourth Circuit's decision does not offend *General Telephone*'s limited holding. The Court in *General Telephone* was concerned that EEOC would be *completely foreclosed* from representing classes of discrimination victims if it were required to satisfy the requirements of Fed. R. Civ. P. 23. The Fourth Circuit's decision, which preserves large-scale injunctive remedies, fully protects EEOC's ability to serve the public interest. *See supra* p. 24-27. The public interest in EEOC's recovery of damages paid to a specific individual because of an unlawful employment decision is negligible where, as here, the individual claimant may obtain fast and full relief in arbitration.

To bolster EEOC's argument that an individual's decisions cannot limit its enforcement activities, the agency asserts its attorneys do not represent the underlying charging parties in enforcement proceedings (Pet. Brf. at 21). This position is curious at best, as EEOC consistently has advocated the exact *opposite* position in other cases. Indeed, in numerous cases, EEOC has maintained, and courts have agreed, that its lawyers have an attorney-client relationship with charging parties and their communications with charging parties are privileged. *See, e.g., EEOC v. Johnson & Higgins*, 1998 U.S. Dist. LEXIS 17612 (S.D.N.Y. Nov. 6, 1998); *EEOC v. NEBCO Evans Dist., Inc.*, 1997 U.S. Dist. LEXIS 23111 (D. Neb. June 5, 1997); *EEOC v. McDonnell Douglas Corp.*, 948 F. Supp. 54 (E.D. Mo. 1996); *EEOC v. ChemTech Int'l Corp.*, 1995 U.S. Dist. LEXIS 21877 (S.D. Tex. May 18, 1995); *EEOC v. HBE Corp.*, 1994 U.S. Dist. LEXIS 9326 (E.D. Mo. May 19, 1994); *EEOC v. Georgia-Pacific*, 1975 U.S. Dist. LEXIS 15377 (D. Or. Nov. 10, 1975).

Additionally, EEOC has asserted the psychotherapist-patient privilege on behalf of the individuals it represents in court. *See EEOC v. Danka Industs., Inc.*, 990 F. Supp. 1138, 1141-42 (E.D. Mo. 1997) (EEOC filed motion for protective order regarding medical records of alleged victims of harassment).

(3) *EEOC Files Few Cases in Court, Demonstrating Its Limited Role in Litigation*

Further, EEOC is an almost non-existent player in enforcement litigation. This reality belies EEOC's argument that the public interest furthered by its litigation trumps the FAA. During the government's fiscal year 2000, alleged victims of discrimination filed 79,896 discrimination charges with EEOC. *See* U.S. Equal Employment Opportunity Comm'n, *Charge Statistics, FY 1992 through FY 2000* (visited July 1, 2001) <http://www.eeoc.gov/stats/charges.html>. EEOC found "reasonable cause" to believe unlawful discrimination had occurred in 8,248 of those charges. *Id.* EEOC, however, filed just *291* lawsuits during the government's fiscal year 2000, and it intervened in just 109 more.[19] In contrast, *22,412* private lawsuits alleging employment discrimination were filed in federal court in 1999 (Pet. Brf. at 26 n.9). Therefore, EEOC is responsible for bringing fewer than 2% of all anti-discrimination cases filed in federal court. Strikingly, EEOC filed suit in just 3.5% of the cases in which it found "reasonable cause." EEOC's meager litigation docket is consistent with its core function: resolution of discrimination claims via administrative conciliation and *without* litigation. *Cf. Shell Oil*, 466 U.S. at 77-78.

In sum, the FAA and Title VII (and the ADA) co-exist. The Fourth Circuit properly gave effect to each of these statutes, by limiting available relief to EEOC in court, while ensuring EEOC may enforce Title VII and the ADA through injunctive relief. The decision below should be affirmed because of the reasoned and balanced approach the court of

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[19] *See* U.S. Equal Employment Opportunity Comm'n, *EEOC Litigation Statistics, FY 1992 through FY 2000* (visited July 1, 2001) <http://www.eeoc.gov/stats/litigation.html>.

appeals took in accommodating the important federal policies embodied in these statutes.

C. EEOC'S ARGUMENTS ARE PREMISED ON AN OBSOLETE HOSTILITY TOWARD, AND MISTRUST OF, ARBITRATION

Despite this Court's repeated, strong endorsement of arbitration as a desirable and acceptable method of resolving disputes, EEOC continues to resist arbitration of employment discrimination claims. EEOC maintains a formal "policy" against mandatory arbitration of disputes falling within its purview. *See* U.S. Equal Employment Opportunity Commission, *Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (visited July 1, 2001) <http://www.eeoc.gov/docs/mandarb.html> (the "Policy"). In its Policy, issued six years after this Court decided *Gilmer*, EEOC wrongly states mandatory arbitration programs "undermine the purposes of the laws enforced by the EEOC." *Id.* [20]

EEOC gives vitality to its Policy by continuing to argue in court that mandatory arbitration agreements are unlawful. *See, e.g., Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 834 (D.C. Cir. 2001) ("The EEOC has been waging a losing battle in its efforts to convince the courts that agreements like Borg-Warner's cannot be enforced to require employees to arbitrate Title VII claims."); *Frank's Nursery*, 177 F.3d at 454 n.4 (quoting from EEOC's argument that "federal law prohibits the enforcement of arbitration

[20] EEOC attempts in its Policy to distinguish *Gilmer* by claiming the agreement at issue was not part of an "employment contract." This Court's decision in *Circuit City* has rendered that distinction meaningless, holding most employment contracts, like the securities exchange agreement in *Gilmer*, are covered by the FAA. *See Circuit City*, 121 S. Ct. at 249. Yet, EEOC's Policy apparently remains in force; it is published on the agency's website as of this writing and, to Waffle House's knowledge, has not been withdrawn or modified. *See Policy* (visited July 1, 2001) <http://www.eeoc.gov/docs/mandarb.html>.

agreements that require an individual, in this statutory context, to agree prospectively to submit any future claim to arbitration as a condition of initial or continued employment"); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) ("The EEOC as *amicus curiae* contends that employees cannot agree to arbitrate Title VII claims in predispute agreements."; rejecting that view).

EEOC's arguments in the instant case, like its Policy, reveal its position that enforcement of mandatory agreements to arbitrate discrimination claims is contrary to its mission, notwithstanding the courts' nearly unanimous rejection of that view. *See Gilmer*, 500 U.S. at 30 (explaining that generalized attacks on arbitration 'rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and, as such, 'they are far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes' (quoting *Rodriguez de Quijas*, 490 U.S. at 481) (citation and internal quotation omitted)). This Court should view EEOC's arguments in favor of reversal in that light. [21]

[21] While EEOC concedes merely for the sake of argument the validity of the arbitration agreement in the instant case (Pet. Brf. at 10); *see supra* n. 3, some of its *amici* not only challenge the arbitration agreement as unenforceable, but also strenuously argue against arbitration of discrimination claims under any circumstances. *See* Brief *Amicus Curiae* of Lawyers' Committee for Civil Rights Under Law, *et al.*, at 15-20; Brief of The National Employment Lawyers Association, *et al.*, at 16-20; Brief of the States of Missouri, *et al.*, at 10-25.

CONCLUSION

Respondent Waffle House respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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OF THE UNITED STATES
October Term: 2001

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Petitioner

v.

WAFFLE HOUSE, INC.
Respondent

On Writ of Certiorari
to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE MARYLAND COMMISSION ON HUMAN RELATIONS CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES IOWA CIVIL RIGHTS COMMISSION KANSAS HUMAN RIGHTS COMMISSION KENTUCKY COMMISSION ON HUMAN RIGHTS MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION MICHIGAN DEPARTMENT OF CIVIL RIGHTS NORTH CAROLINA HUMAN RELATIONS COMMISSION RHODE ISLAND COMMISSION FOR HUMAN RIGHTS

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INTEREST OF THE STATE OF MARYLAND COMMMISSION ON HUMAN RELATIONS, ET AL., AS *AMICI CURIAE*

The State of Maryland Commission on Human Relations ("MCHR") files this *amici curiae* brief with the written consent of all parties.[1] An *amici curiae* brief stating the position of MCHR, one of over forty (40) state fair employment practices agencies throughout the nation that enforce state anti-discrimination laws, will bring to the Court's attention relevant matters not already brought to its attention by the parties in this action and will be of considerable help to the Court. *See* SUP. CT. R. 37.1.

MCHR has a strong interest in the resolution of the issues in this action. In *EEOC v. Waffle House, Inc*, the United States Court of Appeals for the Fourth Circuit held that an arbitration agreement between a charging party and his employer, subject to the Federal Arbitration Act, ("FAA") does not require the United States Equal Employment Opportunity Commission ("EEOC") to arbitrate the claim and does not preclude EEOC filing suit in federal court to obtain large scale injunctive relief under Title VII

[1] No counsel for any party authored this brief in whole or part. No person, other than amicus curiea, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. SUP. CT. R 37.6

of the Civil Rights Act of 1964, 42 U.S.C.2000c *et seq.* (Title VII). *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 811-813 (1999). However, the Fourth Circuit held an arbitration agreement between the charging party and the employer bars EEOC from seeking backpay, reinstatement, and compensatory and punitive damages, so called "make whole" relief, in federal court under Title VII. *Id.* at 812.

Title VII and Maryland's anti-discrimination statute, Maryland Annotated Code, Article 49B, both create the right to be free from employment discrimination, by way of an exception to the terminable at will doctrine, and remedies for enforcing that exception. *Makovi* v. *Sherwin-Williams Co.*, 561 A.2d 179, 190 (Md. 1989). This Court has recognized that Article 49B is modeled on Title VII and is typical of statutes in some 30 states. *Burnett* v. *Grattan*, 468 U.S. 42, 51 (1984).

State fair employment agencies and state anti-discrimination statutes play an important role in the enforcement of Title VII. The states' enforcement of state laws prohibiting employment discrimination is interrelated and complementary to the national enforcement of Title VII. *New York Gaslight Club. Inc. v. Carey*, 447 U.S. 54, 65 (1980). Title VII establishes a

federal-state enforcement scheme under which EEOC shares responsibility for enforcement of employment discrimination complaints with state agencies with which it has work-sharing agreements. *EEOC v. Techalloy Maryland, Inc.*, 894 F.2d 676, 677-78 (4th Cir. 1990); 29 C.F.R. § 1601.74.

MCHR has a work-sharing agreement with EEOC similar to those EEOC has entered into with state and local agencies throughout the country. *Techalloy*, 894 F.2d at 677-678. The purpose of work-sharing agreements is to "minimize duplication of effort in the processing of charges and to achieve maximum consistence of purpose and results." *Id.* at 678. Complaints filed with MCHR are dual-filed with EEOC and are handled pursuant to the State's administrative process under Article 49B.

Amici have grave concerns if EEOC's ability to seek full relief is found to be impeded by arbitration agreements. This concern is based not only on the ability of our enforcement ally to obtain full relief, but also on the devastating effect on state

enforcement if the same limitations are applied to the states. [2] Because state agencies and their laws have such an important role in Title VII's enforcement, limitation on their ability to obtain "make whole" relief would seriously undermine both state *and* federal enforcement of anti-discrimination laws.

SUMMARY OF ARGUMENT

MCHR enforces Article 49B to vindicate the State's interest. MCHR's role in the procedure established by Article 49B is essential to the enforcement of state anti-discrimination laws, as well as federal laws. The decision in *Waffle House*, if read to prohibit state enforcement agencies from seeking "make whole" relief from persons found to have engaged in unlawful discrimination under state law, whenever the respondent has a private arbitration agreement with the complainant, would preclude enforcement of State law. To preclude enforcement of state anti-discrimination laws would, in turn, seriously undermine enforcement of Title VII.

---

[2] That the rationale of *Waffle House* may be extended to state and local enforcement agencies such as MCHR is not hypothetical. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814, 818, 819 (8th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 383 (2001)(following *Waffle House* in affirming a district court's order enjoining the Missouri Human Rights Commission from seeking individual monetary damages on behalf of an employee whose claims of discrimination had been subjected to mandatory arbitration.

ARGUMENT

I.

THE STATE'S INTEREST IN OBTAINING "MAKE WHOLE" RELIEF IN A STATE ADMINISTRATIVE PROCEEDING FROM A RESPONDENT WHO VIOLATES STATE LAW MAY NOT BE ABROGATED BY THE RESPONDENT'S PRIVATE ARBITRATION AGREEMENT TO WHICH THE STATE IS NOT A PARTY

A. Maryland Has An Historic and Vital Interest In Protecting Its Citizens From Unlawful Discrimination

The State of Maryland has an historic and vital interest in protecting its citizens from unlawful discrimination under state law. Under Article 24 of the Maryland Declaration of Rights, Maryland citizens may not be subject to unequal treatment of the laws. MD. CONST., Decl. of Rights, art. 24. *See also* R.I. CONST., art. I, § 2; CONN. CONST., art. I, § 20. The Maryland Courts have recognized that the concept of equal protection embodied in Article 24 and the concept of equal protection under the Fourteenth Amendment of the United States Constitution are *in para materia*. *Hornbeck v. Somerset Bd. of Educ.*, 458 A.2d 758. 768 n.4 (1983). The Maryland Constitution also provides that Maryland citizens may not be subject to different treatment based on sex. MD. CONST., Decl. of Rights, art. 46. The Court of Appeals of Maryland has "consistently held that a public official

who violates the plaintiff's rights under the Maryland Constitution is personally liable for compensatory damages." *Ritchie v. Donnelly*, 597 A.2d 432, 445 (1991).

Maryland's statutory anti-discrimination law applies to public and private employers. Md. Ann. Code, art. 49B § 7. The State enacted Article 49B "to protect the rights of all Maryland residents in three major areas--housing, employment, and public accommodations." *University of Maryland v. Boyd*, 612 A.2d 305, 309 (Md. 1992); *see e.g.* R.I. GEN. LAWS. §§ 28-5-17, 28-5-2, 28-5-5, CONN. GEN. STAT. §§ 46a-60, 46a-64, and 46a-64c. Maryland's fair employment practice law was enacted over 35 years ago, in 1965 by Chapter 67, Acts of 1964. By Chapter 83, Acts of 1968, MCHR was established and given its present name. MCHR is a duly-constituted, independent agency of the State of Maryland, charged with enforcing Article 49B. Under Article 49B, MCHR "is charged with overseeing all aspects of human relations for the residents of Maryland." *Boyd*, 612 A.2d at 309.

Article 49B, § 14 provides:

> It is hereby declared to be the policy of the State of Maryland, *in the exercise of its police power for the protection of the public safety, public health and general welfare,* for the maintenance of business and good government and for the promotion of the State' s trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment, and to that end *to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.*

Md. Code Ann., art. 49B, § 14 (emphasis added). Maryland's highest court has held that this provision establishes a clear mandate of public policy. *Molesworth* v. *Brandon*, 678 A2d. 608, 616 (Md. 1996). As a matter of public policy, the Maryland Legislature has determined that an employer who unlawfully discriminates should bear the cost of any unemployment caused by the discrimination, whether or not the complainant is reinstated. Md. Ann. Code, art. 49B, § 11(e).

Under Article 49B, Maryland's policy against discrimination includes not only the prohibition of specified discriminatory acts, but also the specific enforcement mechanisms: investigation, conciliation, and prosecution, designed to resolve complaints of employment discrimination at the earliest opportunity, without resort to the courts. Md. Ann. Code, art. 49B, *et seq.* The enforcement mechanism created by Article 49B §§ 9A, 10, 11, and 12 is the *exclusive process* by which an employer may be found to have violated the provisions of Article 49B. *Md. Comm'n on Human Relations v. Downey*, 493 678 A.2d 55, 79 (Md. App. 1996).

B. Article 49B Creates Not Only A Right, But A Remedy For Unlawful Discrimination

Article 49B creates not only a right to be free from unlawful discrimination, but the means by which MCHR must proceed, through an administrative procedure, to enforce that right as the representative of the citizens of Maryland. Md. Ann. Code, art. 49B, §§ 10, 11; *See Makov*, 561 A.2d at 190. Article 49B contains an investigation and enforcement scheme that is quite similar to the procedure established by § 10 of the National Labor Relations Act. *Downey*, 678 A.2d at 79. The administrative

procedure mandated by Article 49B emphasizes efficient resolution of discrimination complaints.

Article 49B, § 10(a) mandates that: "After the filing of any complaint the Executive Director shall consider the complaint and refer it to the Commission's staff for prompt investigation." Md. Code Ann., art. 49B, § 10(a); *See Banach v. State Com'n on Human Relations*, 356 A.2d 242, 249 (Md. 1976) (recognizing that Article 49B emphasizes "the investigatory function of the Commission"). The investigator is authorized to conduct fact finding conferences, to serve interrogatories, and to issue subpoenas ad testificandum or duces tecum to aid in the investigation. MD. REGS. CODE tit. 14.03.01.04.

The investigation is "conducted in confidence and without publicity," and unless the case reaches the public hearing stage, MCHR is required to hold confidential any information related to the investigation, as well as the identities of the complainant and respondent. Md. Ann. Code, art. 49B, § 13(a). Based on the entirety of the investigation, MCHR makes a determination, set forth in a written finding, of whether there is probable cause to believe that illegal discrimination has taken place or is taking place. *Id.* § 10(b); MD. REGS. CODE tit. 14.03.01.06. If MCHR

finds no probable cause, the complainant may make a request for reconsideration to the Executive Director. MD. REGS. CODE tit. 14.03.01.06C. If the investigator finds that probable cause exists to believe that discriminatory acts are being committed, MCHR "immediately shall endeavor to eliminate the discrimination by conference, conciliation, and persuasion. . . ." Md. Ann. Code, art. 49B, § 10(b). Only when there is probable cause found *and* a failure to reach an agreement to eliminate the unlawful discrimination, is the complaint certified to proceed to the public hearing stage.

When MCHR's Executive Director certifies the case for public hearing, MCHR's general counsel files a statement of charges in support of the complaint, in the name of MCHR, with the State Office of Administrative Hearings, "requiring the respondent to answer the charges of the complaint at a public hearing before a hearing examiner at a time and at a place certified in the notice." *Id.* § 11(a); MD. REGS. CODE tit. 14.03.01.08A, B. "The case in support of the complaint shall be presented at the hearing by the general counsel of the Commission." Md. Ann. Code art. 49B, § 11(a). In an Article 49B administrative proceeding, the complainant's interests are interrelated with those

of the State, which is represented by MCHR's general counsel. While MCHR and the Complainant are separate parties, MCHR general counsel advocates for the interests of both at the adjudicative stage. *See* MD. REGS. CODE tit. 14.03.01.09C. Similar to a criminal prosecution, the complainant is the State's primary witness.

The hearing examiner "shall be an attorney who is qualified by experience to handle discrimination cases of the type arising under this article." Md. Ann Code, art. 49B, § 2(b). MCHR has delegated the function of hearing and adjudicating Article 49B cases to the State of Maryland Office of Administrative Hearings. MD. REGS. CODE tit. 14.03.01.08B(1).

If the respondent is found to have engaged in any discriminatory act within the scope of Article 49B, the Administrative Law Judge *must* require the respondent to cease and desist from the discriminatory act *and* to take affirmative action to effectuate the purposes of the particular subtitle. Md. Ann. Code, art. 49B, § 11(e). Because the State has an interest in the respondent, as opposed to the citizens of the State, bearing the cost of any unemployment caused by the respondent's unlawful discrimination, Article 49B provides that MCHR may seek to

recover relief in the form of backpay for the complainant's lost wages, with or without reinstatement. *Id.* There is no ability to recover monetary damages other than for lost wages. *Id.* The complainant has no independent right under Article 49B to file an employment discrimination action in court.[3]

A party dissatisfied with the decision of an Administrative Law Judge may appeal to an Appeal Board composed of three MCHR Commissioners, who make the final administrative decision. MD. REGS. CODE tit. 14.03.01.10. Article 49B's carefully crafted mechanism for the investigation and resolution of employment discrimination claims, includes judicial review of a decision unfavorable to the employer. *See Downey*, 678 A.2d at 71.

[3] Article 49B does authorize direct civil actions, under certain circumstances, by persons subjected to discrimination prohibited by local codes of four Maryland Counties. Md. Ann. Code, art. 49B. §§ 42, 43. Article 49B also authorizes civil actions in state court under its housing discrimination subtitle. *Id.* §§ 32, 33,34.

C. **To Hold That State Enforcement Agencies, Such As MCHR, Which Vindicate The Public Interest -- State, As Well As Federal -- Are Precluded From Requiring A Respondent To Provide "Make Whole" Relief For Unlawful Discrimination In *State Administrative Actions* When A Respondent Has A Private Arbitration Agreement, To Which The State Is Not A Party, Would Leave State Interests Unenforceable And Be An Unwarranted Federal Intrusion On State Law**

While a component of a comprehensive national civil rights enforcement scheme, Article 49B is a state administrative anti-discrimination process enacted to enforce the public policy of Maryland, for which the federal proceedings are supplements to the available state remedies for employment discrimination. *See New York Gaslight Club*, 447 U.S. at 63-65. To prevent states from seeking "make whole" relief, in state administrative proceedings, from persons found to have engaged in unlawful discrimination against state citizens under state law, whenever the respondent had a private arbitration agreement with the complainant, would preclude MCHR from enforcing state law under Article 49B, in addition to seriously undermining enforcement of Title VII through unwarranted federal interference with enforcement of state anti-discrimination laws.

1. **MCHR Is An Indispensable Party In Every Action Under Article 49B**

Unlike Title VII, Article 49B is a purely administrative process in which MCHR is an indispensable party. Under Article 49B, MCHR pursues administrative remedies by certifying the case for public hearing and filing a statement of charges for every employment discrimination case in which probable cause has been found whenever the case cannot be conciliated. MD. REGS. CODE tit. 14.03.01.08A & B. "The Commission that files the charge under [MD. REGS. CODE tit. 14.03.01.08B] seeking appropriate relief for an aggrieved party and the public interest" is a party to the proceeding. MD. REGS. CODE tit. 14.03.01.09C.

> This Court has spoken directly on the differences between the Article 49B administrative process and litigation under the federal civil rights acts. In *Burnett*, this Court held that the six-month filing period for complaints under Article 49B was not applicable to actions brought under 42 U.S .C. § 1981 *et seq. Burnett*, 468 U.S. at 55. The Court emphasized the "strikingly different" roles played by complainants in administrative complaints filed with MCHR under Article 49B and by litigants under the federal civil rights acts. *Burnett*, 468 U.S. at 51. As the Court stated:
>
> A person's sole responsibility under this scheme is to "make, sign and file with the Human Relations Commission. . . a complaint in writing under oath." Md. Ann. Code, Art. 49B, § 9(a). The complaint need contain no more than the name and

> address of the person or entity alleged to have committed the discriminatory act, "the particulars thereof," and "other information as may be required from time to time by the Commission." MCHR has delegated the function of hearing and adjudicating Art. 49B cases to the Maryland Office of Administrative Hearings. Although the complainant is potentially liable for a malicious filing, § 12(b), he has no obligation to investigate his allegations more fully. *The entire burden of investigating and developing the case rests on the Human Rights Commission,* which is empowered to issue subpoenas, conduct hearings, and seek judicial enforcement of its orders. §§ 11-12.

Id. (emphasis added).

Thus, it is clear that, under the administrative enforcement process created by the Maryland Legislature for cases of unlawful discrimination, the State, not the complainant, assumes the role of the "litigant," *i.e.*, the State, represented by MCHR general counsel, is the one authorized to enforce Article 49B through *investigation, negotiation and filing formal charges.* 468 U.S. at 57 (MCHR "[a]fter receiving notice of the complaint essentially assumes the role of litigant.").

2. Article 49B's Anti-Discrimination Enforcement Procedure Is Entirely Compatible With The Purpose Of The FAA

Undoubtedly, the FAA preempts any conflicting state legislation. *Southland v. Keating*, 465 U.S. 1 (1984). The FAA was originally enacted in 1925 and its basic purpose was to overcome the hostility of the courts to the enforcement of written agreements to arbitrate. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 273 (1995). It was passed to "place such agreements 'upon the same footing as other contracts.'" *Id.* at 271 This Court has made clear that a party does not forgo substantive rights under the FAA: "it only submits their resolution in an arbitral, rather than a *judicial* forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)(emphasis added).

Article 49B's administrative enforcement process, to investigate and attempt to resolve employment discrimination cases without resort to the courts, is entirely compatible with the purpose of the FAA. As the State agency designated to enforce Article 49B, MCHR has the expertise in handling allegations of discrimination. *State Com'n on Human Relations v. Washington County Community Action Council, Inc.*, 476 A.2d 222, 227 (Md.

App. 1984). The remedy available through the administrative process may be more desirable than the judicial process because it sometimes is more expedient and less expensive and because of the administrative agency's expertise in uncovering discriminatory practices. *Makovi*, 561 A.2d at 199 (Adkins, J., dissenting)(citing Art. 49B, §§ 9-12).

The administrative procedure may also be more desirable because the State bears the cost, whereas an arbitration agreement which requires the employee to bear the cost of arbitrator's fees may create a disincentive to arbitrate. *See Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 559 (4th Cir. 2001) (holding that an agreement requiring the discrimination complainant to pay half the arbitrator's fees and costs (which can be in the thousands) does not render the agreement *per se* unenforceable); *Ackerman* v. *The Money Store*, 728 A.2d 873, 878 (N.J. Super. 1998) (the court refused to order a plaintiff to arbitrate his disability discrimination claims under the New Jersey Law Against Discrimination, in so doing the Court stated: "The rights granted under Section 13 are not minor provisions of the [Law Against Discrimination] but represent the means by which an injured party who experiences discrimination may act . . . . By

proceeding administratively, an employee does not have to hire an attorney and incur the costs which otherwise may deter him or her from pursuing a discrimination claim.").

Although the State clearly has determined that the administrative procedure established by Article 49B is the most desirable way to enforce its anti-discrimination laws, nothing in Article 49B prohibits an individual from entering into a private agreement to arbitrate. *See, e.g., Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, – U.S. — (2001); *cf. Wright*, 525 U.S. at 78 (no presumption of arbitrability under Labor Management Relations Act, "beyond the principle rationale that justifies it, which is that arbitrators are in a better position *than courts to interpret the terms of a CBA*.") (emphasis added). Nor does Article 49B prohibit the State from entering into an arbitration agreement.

However, an agreement to arbitrate, covered by the FAA, to which the State is not a party, cannot deprive the State of its interest in requiring respondents engaged in unlawful discrimination under state law to provide "make whole" relief to the victims of discrimination. Indeed, barring the State from pursuing its substantive enforcement rights under the *administrative process* provided under Article 49B would be

contrary to the purposes of the FAA. *See Mitsubishi Motors Corp.*, 473 U.S. at 628.

3. A Private Arbitration Agreement To Which The State Is Not A Party Does Not Cover The State's Statutory Right To Pursue Its Administrative Remedies

It would be an unwarranted federal intrusion on State law to allow an agreement, covered by the FAA, to which the State is not a party, to preclude the State from pursuing the State's administrative remedies. Only a party to the arbitration agreement that falls within the scope of the FAA can enforce that agreement under the FAA. *See Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997); *Holmes v. Coverall North America, Inc.*, 649 A.2d 365, 369-70 (1994) (arbitration clause severable portion of a contract, which is enforceable in arbitration so long as parties exchange mutual promises to arbitrate disputes under the contract and each promise provides consideration for the other). If MCHR is forced by a private agreement to which the State is not a party to forgo the State's right under Article 49B to seek reinstatement or backpay, the State's interest in remedying unlawful employment discrimination would be rendered unenforceable. *Id.*

Article 49B *requires* that the employer *both* cease and desist the discrimination *and* take *affirmative action to effectuate the purpose of the subtitle*, including providing backpay, with or without reinstatement. Md. Ann. Code art. 49B, § 11(e). "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper Company v. Moody*, 433 U.S. 405, 417 (1974). Backpay awards serve two important functions: they make victimized employees whole for the injuries suffered as a result of past discrimination, and they deter future discrimination. *Id.* at 417-419.

In *Moody*, this Court emphasized the deterrent function of a backpay award. Noting that "the primary objective [of Title VII] was a prophylactic one," the Court explained:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in the country's history.'"

Id. at 417-418 (quoting *United States v. N. L. Industries, Inc.*, 479 F.2d at 354,379 (8th Cir. 1973)) (emphasis added); *See also McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 362

(1995)(barring any recovery of backpay "would undermine the ADEA' s objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.").

The State's interest in the respondent, as opposed to the State, bearing the cost of unemployment caused by unlawful discrimination cannot be represented by a private individual in a private arbitration agreement. An employee's private arbitration agreement with his employer may preclude *him* from filing suit in court against his employer under federal statute. *Gilmer*, 500 U.S. 20 (1991)(addressing ADEA: "*having made the bargain to arbitrate, the party should be held to it* unless Congress itself has evinced an intention to preclude waiver of *judicial remedies* for the statutory rights at issue." *Id.* at 26)(emphasis added). However, "[t]his is not to say that all controversies implicating statutory rights are suitable for arbitration." *Mitsubishi*, 473 U.S at 626.

A private arbitration agreement between an employer and its employee to which the State is not a party simply is not susceptible of an interpretation that covers the State's statutory right to pursue its remedies in a state administrative proceeding because there is no agreement by MCHR to arbitrate according to

common law principles. *See Arrants*, 130 F.3d at 640; *See also Wright*, 525 U.S. at 78 (arbitration clause not susceptible of an interpretation that covers asserted dispute). The FAA places agreements to arbitrate upon the same footing as contracts. *Dobson*, 513 U.S. at 273. As with any other contract, in an agreement to arbitrate, the parties' intentions control. *Mitsubishi*, 473 U.S at 626; *Holmes*, 649 A.2d at 370 ("Once a Court determines that the making of an agreement to arbitrate is not in dispute, its inquiry ceases, as the *agreement to arbitrate has been established as a valid and enforceable contract.*").(emphasis added). Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate. *See Arrants*, 130 F.3d at 640.

The rights asserted under Article 49B by MCHR, which is not a party to an arbitration agreement, arise not out of contract, but *purely by statute*. Accordingly, there simply can be no contractual right coexistent with the State's statutory right at question for an arbitrator to consider under the FAA. *See Wright*, 525 U.S. at 78-79; *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 462 (1999)("courts may not treat the agreement of a

private party to arbitrate her action as the agreement of the EEOC to arbitrate its action.").

When a State in the exercise of its police power for the protection of the public safety, public health and general welfare has determined that a person found to have committed unlawful discrimination under state law should pay for loss of employment opportunities, an arbitration agreement between a charging party and an employer, subject to the FAA, does not require *the State* to arbitrate and the State cannot be precluded by that private agreement from pursuing *the State's interests* in *state administrative proceedings* that are not hostile to the FAA. The State does not waive its right to enforce its law in a *state administrative forum* simply because a complainant signed an arbitration agreement. *See Wright*, 525 U.S. at 80 (waiver in collective bargaining agreement of right to *judicial* forum for ADA claim not "clear and unmistakable"); *Gilmer*, 500 U.S. at 26 (party to arbitration agreement may waive *that party's judicial* remedies).

II.

UNWARRANTED FEDERAL INTERFERENCE WITH ENFORCEMENT OF STATE ANTI-DISCRIMINATION LAWS WOULD SERIOUSLY UNDERMINE ENFORCEMENT OF TITLE VII

The Fourth Circuit's error in *Waffle House* was in not recognizing that the authority to determine who should bear the cost of compensation for unlawful discrimination is a matter of public interest essential to effective enforcement of Title VII through state enforcement of state laws in state administrative proceedings. *See, e.g.*, Md. Ann. Code art. 49B, § 11(e); *see Moody*, 422 U.S. at 417-24 (threat of award of monetary damages important to effective enforcement); *Frank's Nursery & Crafts*, 117 F.3d at 485 (when EEOC seeks to recover backpay for individuals, it sues "in its sovereign capacity" and does not stand "in the shoes of the individuals" (quoting *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 381 (1977)(Rehnquist, J. dissenting); 29 C.F.R. § 1601.74. While acknowledging that the EEOC "acts in the public interest, even when enforcing only the charging party's claim," the Fourth Circuit erroneously found that the EEOC's "public interest is minimal" when it seeks "make whole" relief for a charging party (as opposed to when it pursues "large scale

injunctive relief'). *Id.* at 812. The Fourth Circuit's conclusion is not only lacking in authority, but is at odds with the principles established by this Court many years ago.

This Court has never considered "make whole" relief to be a "private" rather than "public" interest. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the [NLRB] enforces." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177,197 (1941) (National Labor Relations Act). The relief provisions of Title VII (and for that matter, Art. 49B) were modeled on the relief provisions of the National Labor Relations Act. As discussed above, this Court has recognized the importance of backpay awards to both make victimized employees whole for the injuries suffered as a result of past discrimination and to deter future discrimination. *Moody,* 433 U.S. at 417-419 (1974); *Cf. Franks* v. *Bowman Transportation Company, Inc.,* 424 U.S. 747,768 n. 28 (1976) (Rejecting argument that seniority relief implicates only the "make whole" objective of Title VII and does not serve the "primary objective" of eradicating discrimination; "[S]eniority relief cuts to the very heart of Title VII's primary objective of

eradicating present and future discrimination in a way that backpay, for example, can never do.").

State remedies for discrimination play a crucial role in carrying out the important *national* policy against discriminatory employment practices through work-sharing agreements with the EEOC. *See Shaw v. Delta Airlines,* 463 U.S. 85, 101 (1983); 29 C.F.R. § 1601.74. "State laws obviously play a significant role in the enforcement of Title VII." *Shaw,* 463 U.S. at 101. The EEOC files suit in only a fraction of cases, even when EEOC has found probable cause to believe discrimination has occurred. *Gilmer,* 500 U.S. at 28. Under Article 49B, MCHR pursues administrative remedies by certifying the case for public hearing and filing a statement of charges for *every case in which probable cause has been found* whenever the case cannot be conciliated. MD. REGS. CODE tit. 14.03.01.08A & B. That state agencies and their laws play an important role in the federal Act's enforcement strongly militates against any limitation on their ability to obtain "make whole" relief in state administrative proceedings. To rule otherwise would seriously undermine the state *and* federal enforcement of Title VII under the work sharing agreements by removing a key enforcement agency. *See Shaw,* 463 U.S. at 101-104 (1983).

In *Shaw*, this Court held that the federal Employee Retirement Income Security Act of 1974 (ERISA) did not preempt New York's human rights and disability benefit laws even though ERISA expressly preempted all state laws relating to disability plans.[4] The appellant argued that "preemption of state fair employment laws would impair and modify Title VII because it would change the means by which it was *enforced*." *Shaw* 463 U.S. at 101 (emphasis added). The Court agreed. In so doing the Court recognized that:

> Given the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to extent that the Human Rights Law provides a means of enforcing Title VII's commands . . . . If ERISA were interpreted to pre-empt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones.

[4] ERISA preempts "any and all laws insofar as they may now or hereafter relate to any employee benefits plan" covered by ERISA. 29 U.S.C. sec. 1144(a). The section goes on to provide that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supercede any law of the United States ...or any rule or regulation issued under any such law." sec.1144(d).

Id. at 102; *See also, New York Gaslight Club*, 447 U.S. at 63-64 ("Congress envisioned that Title VII's procedures and remedies would [mesh] nicely, logically, and coherently with the State and city legislation, and that remedying employment discrimination would be an area in which [the] Federal Government and state governments would cooperate effectively.")(quotations and citation omitted). Given the necessity of state administrative procedures to the enforcement of Title VII, unwarranted federal interference with the enforcement of state anti-discrimination laws would also seriously undermine enforcement of Title VII.

CONCLUSION

For all the forgoing reasons, Amici respectfully request that this Court reverse the decision of the United States Court of Appeals for the Fourth Circuit holding that an arbitration agreement between a charging party and his employer bars EEOC from seeking backpay, reinstatement, and compensatory and punitive damages under Title VII. In the event the Court affirms the decision of the Fourth Circuit, Amici respectfully request that

the Court make explicit that the decision does not apply to state anti-discrimination statutes.

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In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NOW LEGAL DEFENSE FUND, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether the existence of a mandatory, pre-dispute workplace arbitration policy leaves intact the authority of the EEOC to pursue individual remedies for employees through litigation under 42 U.S.C. § 2000e-5(f)(1) and (g)(1), 42 U.S.C. § 1981a(a)(1) and (d), and 29 U.S.C. § 626(b).

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INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Justice Department, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last 38 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC has a deep and abid-

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[1] The position amici take in this brief has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

ing interest in ensuring the ability of the EEOC to enforce an action on behalf of an individual under the law.

The National Partnership for Women & Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Bowman v. Heller*, 420 Mass. 517 (Mass.), *cert. denied*, 516 U.S. 1032 (1995). NOW Legal Defense participated as *amicus* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). NOW Legal Defense has also participated as *amicus* in numerous cases challenging mandatory arbitration, including *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001); *Wright v. Universal Maritime Serv. Corp.*,

525 U.S. 70 (1998) and *Rosenberg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999).

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. since 1972, NWLC has worked to secure equal opportunity for women in education, the workplace, and other settings, including through litigation of cases brought under national, state, and local antidiscrimination laws. The Center has a deep and abiding interest in ensuring that these laws are fully implemented and enforced.

INTRODUCTION

In June of 1994, Eric Scott Baker seated himself at a Waffle House booth in Columbia, South Carolina and—as a precondition to seeking a $5.50 an hour job as a grill operator—signed a job application that consigned "any dispute or claim concerning Applicant's employment" to "binding arbitration." When the EEOC later sought to litigate a challenge to Mr. Baker's termination under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, it was met with this application as an absolute bar to proceedings to obtain an individual remedy for Mr. Baker.

This year, the Court held that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, governs arbitration of contracts of employment in interstate commerce, other than those excluded by Section 1 covering "only contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1311 (2001).

The Court accepted this case to decide whether the existence of a mandatory, pre-dispute workplace arbitration policy governed by the FAA forestalls EEOC enforcement authority under 42 U.S.C. § 2000e-5(f)(1) and (g)(1); 42 U.S.C. § 1981a(a) and (d); and 29 U.S.C. § 626(b).[2] The issue is whether Mr. Baker, by applying to work at Waffle House, relinquished all rights save for those that he could vindicate through arbitration—including the government's independent authority to obtain an individual remedy for him in a judicial forum.[3]

The realm of private ordering does not stretch as far as Waffle House would argue here.[4] Private arbitration

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[2] Notably, this case does *not* present the issue of the claim preclusive effect of an arbitration award, because Mr. Baker never arbitrated his claim under Waffle House's policy. It is uncertain whether arbitration awards have a preclusive effect on litigation in federal court. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985). It is anomalous, given the uncertainty on this point, why the mere *existence* of an arbitration policy should therefore preclude federal litigation.

[3] This appeal proceeds on the EEOC's concession, for purposes of this appeal, that Mr. Baker's assent to arbitration with Waffle House is presumptively valid. *Amici* nonetheless find considerable merit in the dissenting opinion of Judge King, which concluded that the district court did not clearly err in holding that there was no agreement to arbitrate between Mr. Baker and the respondent in this case (because Mr. Baker was not required to resubmit himself to arbitration when he applied for a second time to work at a different Waffle House location). *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 813-18 (4th Cir. 1999) (King, J., dissenting), *cert. granted*, 121 S. Ct. 1401 (2001).

[4] *NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO*, 473 U.S. 61, 90 (1985) ("if private ordering were sufficient to alleviate all

(continued...)

policies under the FAA do not abrogate EEOC-initiated employment actions to obtain victim-specific relief. To hold otherwise would cross the line that this Court drew against prospective waivers of civil rights in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). The employee would unwittingly lower the shield of the EEOC's enforcement powers. It would also not be "appropriate" under 42 U.S.C. § 12212 and section 118 of the Civil Rights Act, given that in the same legislation that authorized some forms of arbitration, Congress also conferred new authority upon the EEOC to seek individual remedies.

SUMMARY OF ARGUMENT

Section I shows how Congress has now twice empowered the EEOC in 1972 and 1991 to bring actions to obtain individual relief for employees. Section II shows why a mandatory, pre-dispute workplace arbitration policy—as a matter of statutory and contract law—cannot insulate an employer from an EEOC action for individual relief. *First*, foreclosing EEOC enforcement of the law through obtaining individual relief would be inconsistent with the statutory mechanism established by Congress. *Second*, the existence of a workplace arbitration policy may not abridge employees' rights prospectively to a remedy that may be conferred by the EEOC. *Third*, extending a mandatory, pre-dispute arbitration policy to the EEOC is not "appropriate" under 42 U.S.C. § 12212 or section 118 of the Civil Rights Act of 1991,

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[4] (...continued)
labor problems then there would be no need for labor laws") (Rehnquist, J., dissenting).

because Congressional approval of some forms of non-coersive alternative dispute resolution (including arbitration) came in the same act that expanded the EEOC's authority to seek legal relief under 42 U.S.C. § 1981a. *Fourth*, such a policy would be void under the common law contract defense of illegality—incorporated by reference in the FAA, 9 U.S.C. § 2—because it impairs government enforcement of public rights in derogation of public policy.

ARGUMENT

I. CONGRESS CHARGED THE EEOC TO BRING LITIGATION TO SECURE RELIEF FOR INDIVIDUALS AS AN IMPORTANT ELEMENT OF A CONCERTED ENFORCEMENT MECHANISM

In 1972, Congress recognized that litigation by individuals was an insufficient means by which to eliminate discrimination from the workplace. As this Court observed, previously "each individual victim of discrimination . . . [would] go into court as a private party, with the delay and expense that entails, in order to secure the rights promised him under the law." *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 n.7 (1980) (*quoting* S. Rep. No. 92-415, p. 4 (1971)). Individual employees may not have the facility or resources to seek out and retain a lawyer and bring litigation or, for that matter, an arbitration proceeding. Employees' claims may be too complex or difficult, the employers too small or the employees too unsophisticated to attract the private bar's attention.[5] Finally, only a public agency

[5] *See, e.g.*, William Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. Davis. L. Rev. (continued...)

that reviews many complaints will have the perspective to cull cases for enforcement priority.[6]

Congress crafted a joint public/private mechanism for enforcing civil rights under Title VII, which includes (1) authorizing the EEOC to investigate and conciliate claims of discrimination, to interpret the law (42 U.S.C. §§ 2000e-5(b) and 2000e-12) and to litigate claims (*id.* § 2000e-5(f)(1)); (2) granting the Department of Justice enforcement authority against State and local governments (*id.* §§ 2000e-5(f)(1) and 2000e-6); and (3) allowing private lawsuits. Congress incorporated the same enforcement provisions by reference in the ADA, the statute at issue in the present case (*id.* § 12117).[7]

[5] (...continued)
1075, 1084 (2000) ("Given the imbalance of power between growers and farm workers, government can play a critical role in helping farm workers. Realistically, very few lawyers in the private bar will take on farm worker or other immigrant employment matters."); Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality And Theory*, 48 Hastings L. J. 197, 235 (1997) (survey of attorneys finds that "blue collar workers terminated from employment" have difficulty obtaining counsel).

[6] *See, e.g.*, Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 Yale L. & Pol'y Rev. 219, 220 (1995) ("The EEOC . . . has both the resources and the responsibility to monitor employment practices and bring the strongest possible cases attacking discriminatory practices. The best way to attack discriminatory practices is to investigate and prosecute firms based on the use of statistical evidence. The EEOC not only has access to this type of data but also possesses the necessary investigatory powers and legal expertise.").

[7] Under the ADEA, Congress also authorized the EEOC to commence suit; the private right to bring an action termi- (continued...)

Indeed, Congress consistently has acted to extend and enhance the EEOC's enforcement role by means of seeking relief for individuals. Again, in 1991, Congress added powerfully to the EEOC's enforcement authority by conferring power upon it as a "complaining party" to seek individual legal remedies (including compensatory and punitive damages). 42 U.S.C. § 1981a(a) and (d). And in addition to federal agency responsibility for enforcing anti-discrimination laws by seeking individual relief, Congress took care to include and encourage civil rights enforcement by state anti-discrimination agencies.[8] *California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 282-83 (1987) (noting "the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity"). Many states authorize government action (through judicial or administrative channels) to provide

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[7] (...continued)
nates when the EEOC files. 29 U.S.C. § 626(b) and (c)(1). Under the ADEA, "[n]o waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter." 29 U.S.C. § 626(f)(4). This term expressly renders unenforceable any contract that purported to waive the Commission's authority to enforce the ADEA.

[8] *See* 42 U.S.C. § 2000e-5(b) to -5(f) (EEOC cooperation with State and local authorities); 42 U.S.C. § 2000e-7 ("[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State . . ."); 42 U.S.C. § 2000h-4 (disclaiming Congressional intent "to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter").

individual remedies to aggrieved employees.[9] Thus, the ability of state agencies independently to seek relief for individuals who have suffered discrimination is an extension of the comprehensive enforcement mechanism Congress found necessary and desirable to combat the national problem of bias in the workplace.[10]

Congress has established as an essential feature of enforcement of non-discrimination laws the authority and ability of the EEOC (and corresponding state agencies) to obtain individual relief for victims. Thus, as discussed more fully in Argument II below, a rule that would foreclose the EEOC from obtaining relief for individuals in its cases by virtue of an agreement between private parties, entered in advance of any employment relationship, would alter that arrangement and impair its ability to enforce the law, and do so in a way not authorized or provided for by Congress. Further, the opportunity—indeed, incentive—for an individual to prompt enforcement of the law by the EEOC by filing an administrative charge, and thereby to obtain individual relief, is not only an absolutely essential requisite in the enforcement mechanism fashioned by Congress, but is a

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[9] *See, e.g.*, ARIZ. REV. STAT. § 41-1481(D); CAL. GOV'T CODE § 12965(a); COLO. REV. STAT. § 24-34-405; DEL. CODE, TIT. 19, § 712; HAW. REV. STAT. § 368-3; IDAHO CODE § 67-5908; IND. CODE § 22-9-1-6; MICH. COMP. LAWS § 37.2605; OHIO REV. CODE § 4112.05.

[10] The Court must take care in ruling in this case that it does not interfere with state administrative power to enforce civil rights, for such law may conceivably be preempted under *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). *See Circuit City*, 121 S. Ct. at 1312-13 (discussing these cases).

substantive protection provided by Title VII and like statutes. A rule that would foreclose the EEOC from proceeding on a meritorious charge due to the existence of a mandatory, pre-dispute workplace arbitration policy, would seriously impair Congress's enforcement mechanism, both by preventing the EEOC from enforcing the law where it has uncovered employment discrimination, and by effectively removing any purpose or incentive for the filing of charges of discrimination—the source of information upon which the investigation and enforcement mechanism largely is based—by employees who believe they are bound by such policies.[11]

II. MANDATORY, PRE-DISPUTE ARBITRATION POLICIES DO NOT ABROGATE THE FEDERAL GOVERNMENT'S POWER TO OBTAIN RELIEF FOR EMPLOYEES WHO SUFFER DISCRIMINATION

The Solicitor General argues, and *amici* agree, that Congress conferred a statutory grant of authority upon the EEOC to seek individual relief in a judicial forum—

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[11] Aside from these civil rights statutes, Congress has often authorized combined public and private judicial enforcement of federal workplace laws; all of these arrangements may be implicated by this case. *See, e.g.*, 29 U.S.C. § 216(c) (Secretary of Labor can seek relief for employees under the FLSA); 29 U.S.C. § 1132(a) (Secretary can seek relief under ERISA); 29 U.S.C. § 1855(b) (Secretary can seek relief for retaliation against employees under the Migrant And Seasonal Agricultural Worker Protection Act); 29 U.S.C. § 2005(b) (Secretary can seek relief for employees under the Employee Polygraph Protection Act); 30 U.S.C. § 815(c)(2) (Secretary's action for anti-retaliation under Federal Mine Safety and Health Act); 38 U.S.C. § 4323(a) (Attorney General can bring action under Veterans' Reemployment Rights Act).

see generally *General Tel. Co.*, 446 U.S. at 324-26—and that individual employees lack sovereignty to submit such public authority to private arbitration. For four reasons, *amici* argue that a private arbitration policy cannot be interposed against the EEOC as it seeks relief for individual employees: (A) foreclosing EEOC enforcement of the law through obtaining individual relief would be inconsistent with the statutory mechanism mandated by Congress; (B) it would curtail employees' remedial rights prospectively, rather than effectively vindicate those rights; (C) it would not be "appropriate" under 42 U.S.C. § 12212 or Section 118 of the Civil Rights Act of 1991 because Congress linked its recognition of alternative dispute resolution with an expansion of the EEOC's authority to seek legal relief under 42 U.S.C. § 1981a; and (D) such a policy would be unenforceable under FAA, 9 U.S.C. § 2, to the extent that it impairs law enforcement efforts.

A. Foreclosing EEOC Enforcement of Anti-Discrimination Laws Through Obtaining Individual Relief by Virtue of the Existence of a Private Arbitration Policy Would Be Inconsistent with the Statutory Mechanism Established by Congress

Foreclosing EEOC enforcement of the law through obtaining individual relief would be inconsistent with the statutory mechanism established by Congress. An important component of the balance struck in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)—finding ADEA claims arbitrable under the FAA—was that EEOC enforcement would serve as a backstop to private arbitration policies. "An individual ADEA claimant subject to an arbitration agreement will still be free

to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Gilmer*, 500 U.S. at 28. Yet the Fourth Circuit's expanded view of the effect of a mandatory, pre-dispute arbitration policy as precluding the government from effectively enforcing the law through obtaining relief for individuals violates both the mechanism and methods of enforcement Congress has selected and this Court's clearly stated recognition of that enforcement mechanism in *Gilmer*. It would evicerate much of the remedial power that Congress conferred under 42 U.S.C. § 2000e-5(f)(1) and (g)(1); 42 U.S.C. § 1981a(a) and (d); and 29 U.S.C. § 626(b)—divesting the EEOC of any statutory authority to pursue individual remedies in the face of such a private policy.

The importance of having the EEOC exercise its full, undivided enforcement authority has been stressed by this Court. *See, e.g., EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) ("[i]n its current form, Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination") (*quoting Occidental Life Insurance Co. v. EEOC*, 432 U.S. 335, 359 (1977)); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (remedies available under Title VII constitute a "complex legislative design directed at an historical evil of national proportions").

As discussed in Argument I above, Congress expanded the EEOC's authority to seek individual remedies when, in 1991, it amended Title VII to allow the EEOC for the first time to pursue individual legal remedies (including compensatory and punitive damages) by defining the agency as a "complaining party." 42 U.S.C. § 1981a(a)(1) and (d). It was error for the court below to second-guess

Congress's judgment—regarding the importance of the government's authority to seek remedies for individuals who have suffered discrimination in securing enforcement of the laws—and determine that these additional powers were "less significant" than purely injunctive relief. *Compare EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999) (public interest in EEOC's enforcement of charging party's claim deemed "less significant" by panel majority than "an EEOC suit seeking large scale injunctive relief to attack discrimination more generally") *with EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 466 (6th Cir. 1999) ("[i]f Congress believed the EEOC could effectively eradicate employment discrimination through injunctive remedies alone, it would not have empowered the EEOC to obtain more"). Congress, having determined the means of government enforcement and weighed the respective benefits of genuinely voluntary alternate dispute resolution and EEOC enforcement of civil rights, left no room for the courts to calibrate the EEOC's power under the banner of "public policy."

Finally, the arguments favoring termination of the EEOC's authority to seek individual remedies reduce to a plea of "just desserts"—that employees who supposedly consented to arbitration should not be able to make an "end run" around the agreement by entreating the Commission. *See, e.g., EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 303 (2d Cir. 1998). This paints a false picture of the enforcement mechanism that Congress has chosen and the relationship between the employee and the EEOC. From the time that the Commission files a civil action upon an employee's charge, the employee loses effective control of her case. The employee cannot withdraw the charge without the EEOC's consent (29

C.F.R. § 1610.10); any decision to pursue the charge rests with the EEOC (42 U.S.C. § 2000e-5(f)(1)); and, depending on the statute involved, the plaintiff may only intervene in the EEOC's case (under Title VII and the ADA, 42 U.S.C. § 2000e-5(f)(1)) or else lose the right to proceed entirely (under the ADEA, 29 U.S.C. § 626(c)(1)). Thus, the EEOC does not proceed as the assignee of the employees' claim, but pursues statutory enforcement. "[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal noncoercive fashion." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

As Judge Feinberg observed in his concurring opinion in *Kidder, Peabody*, 156 F.3d at 304, the EEOC can only assign so much priority to actions involving mandatory arbitration policies: "EEOC resources to pursue discrimination claims are limited, and the majority of employees who have signed arbitration agreements will therefore not have the benefit of EEOC involvement. I do not think it likely that the EEOC will pursue monetary damages simply to accommodate employees seeking to avoid arbitration, and do not believe that the FAA would be unduly 'undermined' by permitting the EEOC to pursue monetary damages on behalf of employees when it deems such action appropriate." *See also EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 701 (6th Cir. 1999) ("[w]e need not fear that employees will sidestep arbitration agreements by having the EEOC bring suits for damages on their behalf because the decision whether to pursue a charge rests with the EEOC"). Few employees would rationally surrender their rights to arbitrate their

claims in the modest hope that the EEOC will pluck their charges out of thousands to litigate.[12]

B. Abrogation of the EEOC's Authority Under a Private Arbitration Regime Would Constitute an Impermissible Waiver of Employees' Prospective Rights to a Remedy

This Court's decision in *Gilmer* was premised on the assumption that parties to an arbitration regime would "'not forgo the substantive rights afforded by the [ADEA],'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). It is expected that parties shall be able to "effectively vindicate their . . . claim[s] in an arbitral forum." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987). "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637. *See also Green Tree*

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[12] This case does not present the question of dual proceedings for individual relief because Mr. Baker did not initiate arbitration proceedings, although even the rule fashioned by the Fourth Circuit's panel majority recognizes that the EEOC could proceed with an action on the basis of Mr. Baker's charge for other than victim-specific relief. 193 F.3d at 811. Likewise, because Mr. Baker did not receive an arbitration award, this case does not present the question how the EEOC or the courts should handle the potential for separate recoveries of the same relief. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998) (where ADEA plaintiff received severance pay in exchange for an invalid release, "courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee").

Financial Corp.-Alabama v. Randolph, 121 S. Ct. 513, 521 (2000) (TILA claims may be arbitrated provided that the debtor can effectively vindicate her rights).

Courts must vigilantly police arbitration policies to assure that substantive rights are not sacrificed.[13] Without guardrails to prevent abuse, an employer's requirement that a prospective employee enter into an "agreement" to arbitrate degenerates into nothing more than a coerced prospective waiver of substantive civil rights protections, which this Court unequivocally rejects. As this Court held in *Alexander*, 415 U.S. at 51: "[T]here can be no prospective waiver of an employee's rights under Title VII. . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. . . . [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII."

This Court's recent precedents—notably *Gilmer*—hold in effect that abandonment of the judicial *forum* is not itself a prospective waiver of rights. But courts have not allowed employers to impose arbitration policies on their employees to short-circuit other provisions of substantive law.

Courts, for instance, have regularly rejected prospective waivers of statutory remedies. In *Gilmer*, the Court particularly noted that the New York Stock Exchange ("NYSE") rules did "not restrict the types of relief an

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[13] Thus, this Court held that judicial review of arbitral awards in civil rights cases "'must be sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32 n.4 (quoting *Shearson/American Express*, 482 U.S. at 232).

arbitrator may award." *Gilmer*, 500 U.S. at 32. *See also Desiderio v. Nat'l Assoc. of Securities Dealers*, 191 F.3d 198, 205 (2d Cir. 1999) (reaffirming need for full set of statutory remedies under Title VII in arbitration), *cert. denied*, 121 S. Ct. 756 (2001). *Cf. Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 (1945) ("[t]o allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy"). As one judge wrote, striking down a cap on damages written into an arbitration policy, "[p]unitive damages and back pay are powerful deterrents to employers who might otherwise discriminate on the basis of race. The failure of the . . . arbitration provision to provide those remedies shields [the employer] from the full force of Section 1981 and prevents Plaintiff from effectively vindicating her rights."[14]

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[14] *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. (BNA) 1533, 1538 (D. Md. 1999), *aff'd sub nom. Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir.) (adopting district court opinion), *cert. denied*, 530 U.S. 1276 (2000). *See also Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (refusing to compel arbitration where provision deprived plaintiff of Title VII damages); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (severing arbitration clause that purported to waive rights to liquidated damages and attorneys' fees), *cert. denied*, 516 U.S. 907 (1995); *Etokie v. CarMax Auto Superstores, Inc.*, 133 F. Supp. 2d 390 (D. Md. 2000) (striking out limitations on damages from arbitration clause); *Gannon v. Circuit City Stores Inc.*, 83 Fair Empl. Prac. Cases (BNA) 641, 643 (E.D. Mo. 2000) (caps on damages prevent worker from "effectively vindicating" rights); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1287-88 (N.D. Ala. 2000) (striking out caps on damages); *DeGaetano v. Smith Barney, Inc.*, 983

(continued...)

So, too, private arbitration policies cannot be invoked to deny employees prospectively any remedy that they might be allowed by law to receive from the EEOC. Yet the Fourth Circuit's decision below heedlessly strips away several substantive protections conferred by Congress upon employees: 42 U.S.C. § 2000e-5(f)(1) and (g)(1), 42 U.S.C. § 1981a(a)(1) and (d), and 29 U.S.C. § 626(b).

The Fourth and Second Circuits deemed significant that lower courts have sometimes enforced private settlement agreements and final judgments in individual discrimination cases against the EEOC.[15] But these cases deal with the final disposition of the *merits* of a claim by agreement or litigation, and not an agreement merely as to the *forum* in which only those claims under the control of the individual will be resolved. Moreover, those cases involved the *post-dispute* resolution of claims, rather than an attempt (as here) to order future relations by contract. Attempts by employers to read releases to cover *future* (*i.e.* prospective) events have

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[14] (...continued)
F. Supp. 459, 464-70 (S.D.N.Y. 1997) (policy barred award of statutory attorneys' fees); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027-28 (D.N.M. 1996) (policy did not provide full range of Title VII damages).

[15] *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818-19 (8th Cir.) (enjoining commissioners of state civil rights agency from proceeding on already-arbitrated claim), *cert. denied*, 121 S. Ct. 383 (2000); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (Commission cannot obtain additional individual remedies for plaintiff who already litigated claim); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 498 (3d Cir. 1990) (applying representative claim preclusion against EEOC).

met with consistent failure. *See, e.g., Wagner v. The NutraSweet Company*, 95 F.3d 527, 533-34 (7th Cir. 1996) (release of pay discrimination claims did not extinguish liability for post-release paychecks); *Adams*, 67 F.3d at 584 (release in employee's severance agreement does not extend to failure to rehire claim); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) ("even if the settlement agreement is interpreted to relieve the [employer] of the obligation to consider any of plaintiff's future employment applications, plaintiff can still assert a Title VII claim against the [employer] if it rejects her employment applications for a reason prohibited by Title VII"), *cert. denied*, 510 U.S. 1120 (1994); *Gustafson, Inc. v. Bunch*, 83 Fair Empl. Prac. Cas. (BNA) 375 (N.D. Tex. 1999) (same), *aff'd*, 244 F.3d 134 (5th Cir. 2000). A release covering *future* employment discrimination would cross the *Alexander* line into prohibited prospective waiver of civil rights.

Nor, of course, can these cases be read to support a prospective waiver of substantive rights to a remedy. The Fourth and Second Circuits lost sight of the crucial distinction in *Gilmer* between a permissible agreement as to forum, and an impermissible *prospective* waiver of substantive protections under the statute. This error lead the court below mistakenly to apply these cases to translate an agreement as to the forum in which a person could individually pursue his or her claims into a prospective waiver of substantive statutory protections, including the opportunity to obtain relief through an action initiated pursuant to the independent enforce-

ment authority of the EEOC.[16] Unless the Court is prepared to countenance continued efforts by employers to impose further and further restrictions on their employees' federal rights, this case presents the opportunity to correct this errant trend.

C. Enforcement of a Private Arbitration Policy Against the EEOC is Not "Appropriate" Under 42 U.S.C. § 12212 and Section 118 of the Civil Rights Act

Heightened scrutiny is also warranted by the Civil Rights Act of 1991. Section 118 of Pub. L. 102-166, 105 Stat. 1071, 1081 (1991) amended Title VII and ADEA to provide that *"[w]here appropriate* and to the extent authorized by law, the use of alternative means of dispute resolution, including, . . . arbitration, is encouraged to resolve disputes arising under the Acts . . . ." (emphasis added). Congress adopted the same provision one year earlier under the ADA, 42 U.S.C. § 12212.

This Court in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998)—another ADA case—noted that Congress's choice of the words "where appropriate" was not a nullity. At least in the collective bargaining setting, the Court held that "absent a clear waiver, it is not 'appropriate' . . . to find an agreement to arbitrate." *Wright*, 525 U.S. at 82 n.2. Based on a reading of the entire Civil Rights Act of 1991, just as it would be

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[16] *Kidder, Peabody & Co., Inc.*, 156 F.3d at 301; *Waffle House*, 193 F.3d at 813. *Amici* also concur with the Sixth Circuit's explanation that this line of cases assumes incorrectly a privity relationship between the charging party and the EEOC. *Frank's Nursery*, 177 F.3d at 462-65.

inappropriate for a third-party union to waive an employee's statutory rights by any other than the clearest terms, so too it would be inappropriate for an employee to unwittingly terminate the EEOC's full enforcement authority.

In the same legislation where Congress opened the door to at least some form of non-coercive alternative dispute resolution, including arbitration, it contemporaneously amended the civil rights acts to allow the EEOC to seek individual legal remedies as a "complaining party." 42 U.S.C. § 1981a(a)(1) and (d) "[G]uided by the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict," *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986), the Court should not read the encouragement of alternative dispute resolution as in any way limiting Congress's decision to bolster EEOC's enforcement power.

The House Judiciary Committee Report, incorporated by reference into the House Conference Report, discusses the ADA alternative dispute resolution section as follows:

> This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include . . . arbitration.
>
> . . . *The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act.* Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract,

> does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in title I. The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of Section 513 [the ADA arbitration section] be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

H.R. Rep. No. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500 (footnote omitted, emphasis added). *See also* H.R. Rep. No. 102-40(I) (1991), 102d Cong. 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 635. The italicized text takes on added significance because, in the same statute, Congress provided expanded enforcement powers for the EEOC to seek individual remedies. We do not presume that Congress intended one section of the Act to eclipse the other.

Courts of Appeals have likewise found Congress's choice of language meaningful. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20 (1st Cir. 1999), the employer's failure to provide the employee a set of the arbitration rules governing her agreement rendered arbitration "inappropriate." The First Circuit observed

> Rosenberg's and Merrill Lynch's arbitration agreement did not by itself define the range of claims subject to arbitration, even though Merrill Lynch expressly represented that she would be advised of the rules. It referred only to arbitration of such claims as were required to be arbitrated by the NYSE rules. But those rules were not given to Rosenberg or described to her. The question then becomes which party should bear the risk of her ignorance. Given Congress's concern that agreements to arbitrate employment discrimination claims should be enforced only where "appropriate," a concern not expressed in the FAA or at common law, Merrill Lynch should, we believe, bear that risk.

And the Seventh Circuit—which, prior to *Wright*, rejected an interpretation of Title VII that would have authorized unions to bind employees to arbitration of statutory civil rights claims—also noted the significance of the context of Section 118:

> These provisions . . . encourage arbitration "where appropriate"—and if we are right it is not appropriate when it is not agreed to by the worker but instead is merely imposed by a collective bargaining agreement that he may have opposed. Nothing in the background of the amendments is inconsistent with this interpretation. It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time, Pub. L. No. 102-166, 102, 1977A(c), 105 Stat. 1071, 1073 (1991), to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases. We know that statutes, being products of compromise, frequently reflect inconsistent aims. But if that is the case here, we might expect to find a hint of it in the statutory language or design, or in the legislative history, but we find none.

Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir.) (Posner, C.J.), *cert. denied*, 522 U.S. 912 (1997). In

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998), the Ninth Circuit interpreted the "where appropriate" proviso affirmatively to preclude mandatory pre-dispute arbitration policies under Title VII altogether.[17]

Congress's insistence upon "appropriate" dispute resolution, in short, demands something more than acquiescence to mandatory, pre-dispute workplace arbitration policies, such as imposed by Waffle House on its job applicants. For all of the reasons stated above, enforcing arbitration policies against the EEOC would not be appropriate. It would infringe on the Commission's plenary authority to bring civil actions to remedy discrimination, while prospectively robbing employees of protections conferred by Congress under the various anti-discrimination statutes. And it would not be a sensible interpretation of a variegated statute that deliberately enhanced the EEOC's enforcement power.

D. A Private Contract Barring a Government Agency From Exercising Full Enforcement Authority Would be Void Under the FAA as in Derogation of Public Policy

Intrinsic to the FAA scheme of enforcement is incorporation of common-law defenses against contracts. The FAA deems a written commitment to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any con-

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[17] That court so far stands alone in its view. *See, e.g., Desiderio*, 191 F.3d at 203-06; *Rosenberg*, 170 F.3d at 11; *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999).

tract." 9 U.S.C. § 2. Under common-law principles, adopted by reference through this section, private parties may not enter into contracts that impair or restrain law enforcement efforts. Thus, the FAA would render void any interpretation of Waffle House's arbitration policy as foreclosing an EEOC enforcement action as it would impair the EEOC's authority under 42 U.S.C. § 2000e-5(f)(1) and (g)(1); 42 U.S.C. § 1981a(a) and (d); and 29 U.S.C. § 626(b).

The common-law principle of "illegality" encompasses provisions found to be in derogation of public policy, and renders them void. "There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982). This principle has been often applied by this Court. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) (section 301 of the LMRA "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law"); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) ("[w]ere we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred"); *Brooklyn Savings Bank*, 324 U.S. at 710 ("courts have uniformly held that contracts tending to encourage violation of the laws are void as contrary to public policy").

It is also a commonplace that "an employer cannot purchase a license to discriminate." *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 585 (6th Cir. 1995). *See, e.g., Eisenberg v. Advance Relocation & Storage, Inc.*, 237

F.3d 111, 116-17 (2d Cir. 2000) ("a firm cannot buy from a worker an exemption from the substantive protections of the anti-discrimination laws because workers do not have such an exemption to sell, and any contractual term that purports to confer such an exemption is invalid"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination").

As a corollary to these propositions, an employer should not be able to buy itself transactional immunity from the full breadth of the EEOC's enforcement authority by imposing a duty of arbitration on its employees. What an employer could not lawfully do under the FAA in the explicit text of an agreement—contract with an employee to eliminate the enforcement power of the EEOC over the employment relationship—should not be afforded by courts in the name of the FAA.

Even if Congress did not already have the final word on this issue, the benefits to the public of the EEOC's power to seek individual remedies—unconstrained by private agreements—clearly outweigh the federal policy enunciated by the FAA favoring arbitration.[18] Arbitration is said by its supporters to be less expensive and more expeditious than litigation. "Arbitration agreements allow parties to avoid the costs of litigation, a

[18] *See generally* Restatement (Second) of Contracts, § 178 ("[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms").

benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City*, 121 S. Ct. at 1313. Whether or not this aspiration holds up in practice,[19] the approach promoted here by Waffle House accomplishes only the bifurcation of proceedings (arbitration for individual remedies, federal court for broad injunctive relief) and multiplication of effort. It also raises the prospective challenges of collateral estoppel, potentially inconsistent judgments and multiple appeals in every such divided case. Thus, the avowed benefits of arbitration would be washed out in cases where the EEOC proceeds separately, and the cost of hobbling the EEOC's enforcement power even less justified.

[19] Indeed, as the Court's past term demonstrated, arbitration itself breeds litigation—arising from motions to compel arbitration (*e.g. Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)) and proceedings to enforce awards (*C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 121 S. Ct. 1589 (2001); *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000)).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,

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No. 99-1823

IN THE
SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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No. 99-1823

IN THE

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EEOC EMPLOYMENT OPPORTUNITY COMMISSION,
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WAFFLE HOUSE, INC.,
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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonprofit membership organization of more than thirty-four million people age 50 or older dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research,

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[1/] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

publications, and training programs, AARP seeks to eliminate ageist stereotypes, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect their rights and strives to preserve the legal means to enforce them.

More than forty percent of AARP's members, most of whom are protected by the Age Discrimination in Employment Act (ADEA) and other federal laws prohibiting employment discrimination, remain active in the work force. The vigorous enforcement of these statutes is of paramount importance to all employees, including millions of older workers,[2] who rely on them to deter and remedy invidious bias in the work place.

To ensure that securing compliance with our nation's civil rights laws was not left only to private individuals, Congress empowered the Equal Employment Opportunity Commission (EEOC) to litigate in its own name for both injunctive and victim-specific relief in cases of unlawful employment discrimination. The court below has seriously impaired the congressionally mandated civil rights enforcement scheme by holding that an employer's imposition of an arbitration agreement deprives the EEOC of authority to litigate the right to victim-specific relief.

The Fourth Circuit's decision significantly curtails the EEOC's power to vindicate fully the public interest in eliminating discrimination from the work place. By limiting the EEOC to injunctive relief, the circuit court has removed a crucial incentive to encourage both self-corrective and preventive behavior on the part of employers - the prospect of potentially large, publicly proclaimed damage awards. This Court's decision holding that predispute agreements to

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[2] As of 2000, almost 67.9 million members of the work force (48.2 per cent) were age 40 or older. U.S. Bureau of Labor Statistics, "Employment and Earnings," Vol. 48, No. 1, January 2001 (DC: U.S. Government Printing Office), Table 3.

arbitrate deny individual employees the right to litigate discrimination claims[3] serves to emphasize the ever more crucial role of the EEOC in the enforcement of the nation's civil rights laws.

By depriving the EEOC of the authority to litigate victim-specific relief where the individual is bound by an arbitration agreement, the lower court's holding undermines the congressional grant of power to the EEOC to enforce the civil rights laws in another more subtle, but perhaps equally harmful way. For while it is true, as pointed out by the court below,[4] that an individual who must arbitrate his discrimination claim can still file an EEOC charge, there is little incentive for him to do so if, as in this case, the EEOC is precluded from pursuing individual relief. Further, due to the private nature of arbitration proceedings, if the discrimination victim fails to file a charge, the EEOC, because of simple lack of notice, will be deprived of the opportunity to seek the only relief left open to it by the decision below, an injunction, even in the most egregious circumstances. Thus, the public interest is doubly disserved by the decision of the court below. It is axiomatic that courts should not legislate. AARP respectfully submits that this is precisely what has occurred in the instant case.

For the foregoing reasons, AARP files this brief *amicus curiae* to urge the Court to conclude that the relief available in a civil rights enforcement action initiated by the EEOC is unaffected by an individual's agreement to arbitrate employment discrimination claims.

SUMMARY OF ARGUMENT

In 1972, Congress rectified its failure to include effective enforcement powers in the Civil Rights Act of 1964 by

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[3] *Circuit City Stores, Inc. v. Saint Clair Adams*, 121 S. Ct. 1302 (2001).

[4] *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 811 (4th Cir. 1999).

amending Title VII to authorize the EEOC to vindicate the public interest in eliminating discrimination in the work place by bringing litigation seeking both injunctive and individual relief. It is inconsistent with that congressional mandate to allow a private arbitration agreement to deprive the EEOC of the authority to pursue individual monetary relief, which serves both a deterrent and remedial purpose. The ruling of the court below that an arbitration agreement, to which the EEOC was neither a party nor assented, divests it of the power to litigate victim-specific relief thwarts the will of Congress and undermines the enforcement of the federal antidiscrimination statutes. In short, it is unacceptable public policy to judicially handcuff the nation's primary civil rights enforcer to only injunctive relief simply because an individual employee, in whose interest the EEOC in its discretion has decided to act, has been shackled to an arbitration agreement. It is especially unjust to impair civil rights enforcement in the name of the federal policy favoring arbitration when the EEOC's pursuit of victim-specific relief has little or no effect on the arbitration of employment claims.

ARGUMENT

I. THE EEOC VINDICATES THE PUBLIC INTEREST IN ELIMINATING DISCRIMINATION FROM THE WORK PLACE WHEN IT SEEKS MAKE-WHOLE RELIEF ON BEHALF OF INDIVIDUAL VICTIMS.

In concluding that the EEOC is precluded from seeking make-whole relief on behalf of a charging party who is subject to an arbitration agreement, the circuit court ignored this Court's teachings concerning the twin goals served by back pay awards under this nation's anti-discrimination statues: eliminating discriminatory practices and providing a remedy for their past effects.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court described in significant detail the nature of claims

for back pay under Title VII.[5/] After first noting that "the primary objective [of Title VII] was a prophylactic one: 'It was to achieve equality of employment opportunities and remove barriers . . .,'"[6/] *id.* at 417, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), the Court explained that:

> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges [of discrimination]."

Id., at 417-18, quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 356 (1995), the Court reaffirmed that compensation for injuries caused by discrimination under the ADEA, Title VII, and other federal anti-discrimination statutes, serves not only to make the victim whole, but also to deter future employer misconduct:

> the objectives of the ADEA are furthered when even a single employee establishes that an

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[5/] Since the substantive provisions of the ADEA "were derived *in haec verba* from Title VII," *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), this principle applies with equal force to the ADEA.

[6/] This Court has acknowledged that the goals of the ADEA and of Title VII are the same. *McKennon v. Nashville Publishing Co*, 513 U.S. 352, 358 (1995), quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) ("The ADEA and Title VII share . . . a common purpose: 'the elimination of discrimination from the workplace.'").

> employer has discriminated against him or her. The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important for the occurrence of ADEA violations may disclose patterns of noncompliance resulting from a misappreciation of the ADEA's operation or entrenched resistance to the ADEA's commands, either of which can be of industrywide significance.

513 U.S. at 358-59. If, as the Court has held, the private litigant who "seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the [anti-discrimination statutes]," *id.* at 358, it is illogical to suggest that an award of make-whole relief obtained by the EEOC, the federal agency charged with enforcing this nation's anti-discrimination statutes, does not.

In *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980), the Court stated "that the EEOC is not merely a proxy for the victims of discrimination . . . ." Rather, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* Contrary to the conclusion of the court below, when suing in its own name for individual relief, the EEOC is not merely "do[ing] for [the charging party] what [he] could not have done for himself." *EEOC v. Waffle House, Inc.*, 193 F.3d at 812. Even when it sues on behalf of an individual, "the EEOC never ceases to represent the public interest as well. Indeed, whenever the EEOC sues in its own name, it sues both for the benefit of specific individuals and the public interest." *EEOC v. Frank's Nursery & Crafts*, 177 F.3d 448, 458 (6th Cir. 1999).

The publicity surrounding a significant damages award obtained through an EEOC victory vividly illustrates how the EEOC's pursuit of individual relief "serve[s] as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of

discrimination," *McKennon*, 513 U.S. at 358, quoting *Albemarle Paper*, 422 U.S. at 417-18. Whenever the EEOC succeeds in either settling or prevailing in a lawsuit which includes a significant monetary award to the individual victims, the case and especially the award unfailingly receive widespread and prominent media coverage.[7/]

As the popular adage goes, "Money talks." When the EEOC's enforcement efforts result in large monetary awards, both employers and employees take notice. As the Christian Science Monitor noted in a story about the 1992 settlement of an age discrimination case against IDS Financial Services, Inc. for $35 million, while "the non-monetary aspects of the settlement could serve as useful guidelines," "the heavy financial penalties [ ] send a clear warning to corporate America. . . ."[8/] Whenever the press covers large monetary awards, "discrimination in the workplace . . . emerge[s] more strongly in the public consciousness." Sheila M. Poole and Gertha Coffee Braxton, *Bias in the Workplace; Two High-Profile Lawsuits Chill Companies, Give Workers Support*,

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7/ For examples of press coverage of large monetary awards in age discrimination cases in which the EEOC brought suit, *see, e.g., Company to Pay $28M to Settle Age-Bias Suit*, THE BOSTON GLOBE, July 30, 1999, at E2; Diana Kunde, *Lennox Agrees to Settle Age Bias Suit; $6.2 Million is Second-Largest Amount Awarded Per Person, EEOC Says*; THE DALLAS MORNING NEWS, May 12, 1998, at 4D; Ted Shelsby, *Age Bias Settlement Totals $14 million; Laid-off employees of Westinghouse Filed Suit*, THE BALTIMORE SUN, Nov. 1, 1997, at 1C; Kimberly Blanton, *Boston Edison Pays $2.25M in Age-Bias Case*, THE BOSTON GLOBE, Dec. 19, 1996, at D2; *Lockheed Settles Age Bias Lawsuit for $13 Million*, THE CHICAGO TRIBUNE, Nov. 22, 1996, at N-28; George Lane and Emily Narvaes, *Age-Bias Pact to Cost Martin $200 Million*, THE DENVER POST, Nov. 22, 1996, at A-01; Christopher Carey, *Ex-McDonnell Workers to Get $20 Million in Age Bias Case*, ST. LOUIS DISPATCH, Aug. 13, 1993, at 1A.

8/ *Experience Counts*, CHRISTIAN SCIENCE MONITOR, Sept. 1, 1992, at 20.

THE ATLANTA JOURNAL AND CONSTITUTION, Dec. 19, 1996, at O1E. Both management[9/] and plaintiff attorneys[10/] report an increase in inquiries after the announcement of a large monetary award.

Contrary to the assertion of the Second Circuit in *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 303 (2d Cir. 1998), that there is "no reason to believe that the threat of an award of monetary damages obtained by a private individual through arbitration has any less deterrent value than the threat of an award of monetary damage obtained by the EEOC," there are excellent reasons to believe that even an exceptionally large damage award obtained through arbitration will have significantly less deterrent value than a similar or even smaller award or settlement obtained by the EEOC. First, arbitration decisions and accompanying awards are almost always private [11/] and, thus, do not receive the media attention accorded EEOC public settlements and court

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9/ According to one management attorney, "Companies are chilled by these results. . . And it's going to do two things: Companies are going to realize that settlements are going to come at a higher cost; and internally, companies are going to have to look at practices and control discussions, even in private, that have just a hint of discriminatory bents to them." *Experience Counts*, CHRISTIAN SCIENCE MONITOR, Sept. 1, 1992, at 20. These awards provide "expensive lessons" and often cause companies "to evaluate using diversity training programs for their managers or to expand existing ones." *Id.*

10/ According to one plaintiff's employment attorney, "Every time there's a big, public case, more [victims] come forward." Janet Kidd Stewart, *In the Know; It Pays to Educate Yourself About Workplace Rights*, THE CHICAGO TRIBUNE, Sept. 15, 1999, at CN-7.

11/ *See also* Mary Williams Walsh, *Court Considers if Employer Can Force Pledge Not to Sue*, THE NEW YORK TIMES, Nov. 3, 2000 at A1. ("Many [arbitration] agreements emphasize that the proceedings will be private; some even threaten fines for employees who talk about their grievances.").

victories. Therefore, although the lone employer that is subject to the award obtained through arbitration may think twice before discriminating again, the behavior of all other employers will be completely unaffected by an award of which they are totally unaware.[12/] *See* Reginald Alleyne, *Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum*, 13 HOFSTRA LABOR L. J. 381, 431 (1996) ("It seems evident that a statutory social policy of deterrence, driven in part by the possibility of embarrassment over publicized public law violations, is not effectively served in any private arbitration forum.").

Second, employees who prevail in an arbitration forum are awarded far less in damages than in a judicial forum. *Id.* at 399. As pointed out in the concurrence in *EEOC v. Kidder, Peabody & Co.*, "[I]t [is] eminently plausible that the risk of a single, large award in an EEOC case brought on behalf of multiple employees would be a greater deterrent to illegal conduct than the risk of multiple smaller awards obtained by the employees through arbitration, and the EEOC pursuit of monetary damages therefore greatly advances the public interest." 156 F.3d at 304 (Feinberg, J., concurring.) Although Judge Feinberg felt "constrained to reach" the result supported by the *Kidder* majority opinion, he nevertheless "lack[ed] the majority's confidence ... that the deterrent value of damage awards in arbitration is equal to that of damage awards from EEOC action." *Id.*

12/ *See EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) E-6 (July 11, 1997) ("By awarding damages, . . . the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. . . the risks of negative publicity and blemished business reputation can be powerful influences on behavior.").

II. THE PUBLIC INTEREST IN ELIMINATING DISCRIMINATION FROM THE WORK PLACE OUTWEIGHS THE POLICY FAVORING THE ENFORCEMENT OF PRIVATE ARBITRATION AGREEMENTS.

The court below acknowledged that in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court "appears to have contemplated that arbitration agreements between charging parties and their employers would not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws *in court*." *EEOC v. Waffle House, Inc.*, 193 F.3d at 811-12. Nevertheless, declaring that "when enforcing only the charging party's claim, the public interest of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief," *id.* at 812, the court below concluded:

> When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public interests.

Id.

While the lower courts agree that the EEOC may not pursue victim-specific relief where the individual has unsuccessfully litigated[13/] or settled[14/] his/her claim on the legal ground of *res judicata* or mootness, respectively, the

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13/ *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993).

14/ *See, e.g., EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987).

dispute presented by this case, *i.e.*, whether the private action of an individual who is deemed to have voluntarily agreed to arbitrate his discrimination claim can preclude efforts by the EEOC to vindicate the public's interest in the eradication of discrimination, is fundamentally a public policy question. In resolving the issue in favor of arbitration, the court below ignored the fact that in enacting and amending Title VII, "Congress conferred upon the EEOC the discretion to take away the right of private actors to resolve through arbitration Title VII matters that implicate the public interest." *EEOC v. Frank's Nursery & Crafts*, 177 F.3d at 468. For this Court to hold otherwise would be tantamount to permitting any employee to contract away the duty of the EEOC to enforce vigorously the civil rights laws through the most effective litigation it can bring. A private individual, however, "cannot, by waiving [her] statutory right to vindicate [her] own interest, waive the statutory right of a federal sovereign to vindicate the public interest unless the government agrees to such waiver." *Id.* at 460.[15/] In effect, the circuit court's decision amounts to a legislative pronouncement and is contrary to sound principles of separation of powers.

A. Removing the Potential For Backpay Awards from the EEOC's Enforcement Arsenal Eviscerates the Agency's Ability to Fulfill Its Mission of Eliminating Employment Discrimination.

"If Congress believed the EEOC could effectively eradicate employment discrimination through injunctive remedies alone, it would not have empowered the EEOC to obtain more." *EEOC v. Frank's Nursery & Crafts*, 177 F.3d at 466. In 1972, Congress resolved to remedy its failure to include effective enforcement powers in the Civil Rights Act of 1964 by amending Title VII to authorize the EEOC to bring suit in

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15/ Under the ADEA, "[n]o waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter." 29 U.S.C. § 626(f)(4).

federal court after conciliation efforts have failed. *See* Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261 § 4, 86 Stat. 103, 105. By that time, it was clear that the "failure to grant the EEOC meaningful enforcement powers [had] proven to be a major flaw in the operation of Title VII." S. Rep. No. 92-415, at 4 (1971). "Indeed, Congress expressed its concern that 'in the most profound cases,' employers had 'more often than not shrugged off the [EEOC's] entreaties and relied upon the unlikelihood of the parties suing them.'" *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d at 457, *quoting* H.R. Rep. No. 92-238, at 8.

Ignoring these expressions of congressional purpose to remedy the flaw in Title VII as originally enacted, the court below held that the federal policy favoring arbitration trumps the public interest inherent in the EEOC's power to seek victim-specific relief. Thus, the holding of the court below thwarts the express will of Congress by reverting in large part to the essentially private enforcement mechanism that Congress specifically rejected as ineffective in achieving its goal of elimination employment discrimination.

Additionally, this Court has acknowledged that the EEOC depends on the filing of charges for notification of possible discrimination. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). The court below was quick to point out that while a private arbitration agreement precludes an employee from pursuing his discrimination claim in court, it does not prevent him from filing a charge with the EEOC. *See EEOC v. Waffle House, Inc.*, 193 F.3d at 811. On the other hand, neither does an arbitration agreement encourage him to do so. The employee actually may be *dis*couraged from doing so by the sheer futility of filing a charge where, because of the arbitration agreement, the EEOC is precluded from seeking individual relief through litigation. Moreover, for precisely that reason, the employer has absolutely no incentive whatsoever to even consider providing any monetary relief as part of the pre-litigation conciliation process.

Further, due to the private nature of arbitration proceedings, if the aggrieved individual, with little motivation

other than altruism, fails to file a public charge, the EEOC may *never* be notified of even the most egregious instances of discrimination. Thus, if the decision below is upheld, in many instances, due to simple lack of notice, the EEOC could even be deprived of the opportunity to seek the only relief left open to it, an injunction. The public interest in civil rights enforcement is, therefore, disserved by the decision below in not one, but two different, but related ways. This Court should, therefore, reject this attempt to undermine the enforcement of the nation's antidiscrimination statutes by consigning the public interest "to the law of the shop, not the law of the land"[16] in unnecessary deference to the federal policy favoring arbitration.

B. The EEOC's Pursuit of Make-Whole Relief Does Not Compromise The Federal Policy Favoring Arbitration.

There is no evidence that preserving the congressionally mandated authority that the EEOC has wielded since 1972 to litigate relief for individual charging parties will, as suggested by the court below, "significantly trample" the federal policy favoring arbitration. *EEOC v. Waffle House*, 193 F.3d at 812. In fact, the opposite is true. The EEOC will be unable to pursue litigation on behalf of the vast majority of charging parties bound by arbitration agreements because its resources are quite constrained. Its budget is severely limited and the current administration's request of $310 million now pending before Congress amounts to an effective loss in funding for the next fiscal year.[17] Historically, the EEOC has filed suit only in approximately one half of one percent of all the charges it receives annually.[18] In fiscal year 2000, for

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[16] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974).

[17] *$310 Million Budget Request for EEOC Amounts to Effective Loss for Commission*, Daily Lab. Rep. (BNA), May 15, 2001, at AA-2.

[18] EEOC Litigation Statistics, FY 1992 through FY 2000; EEOC (continued...)

example, the agency reported that it received 79,896 charges of discrimination, but filed suit in only 327 cases, or 0.4 per cent of the charges received.[19/]

Therefore, it is "[un]likely that the EEOC will pursue monetary damages simply to accommodate employees seeking to avoid arbitration," *Kidder Peabody*, 156 F.3d at 304 (Feinberg, Circuit Judge, concurring), and the FAA would not be "unduly undermined by permitting the EEOC to pursue monetary damages on behalf of employees when it deems such action appropriate." *Id.*

Moreover, as the Sixth Circuit has explained, the individual's private right of action is not identical to that of the EEOC:

> [I]f an individual subject to an arbitration agreement filed a charge with the EEOC and ultimately received a "right to sue" letter, that individual would have a private cause of action that she waived by her prospective agreement to arbitrate. However, ... if the EEOC in turn exercised its right to sue, that individual would no longer possess a private cause of action subject to her prior agreement to arbitrate. *Rather, the EEOC would have a cause of action on behalf of that individual and the public interest that would fall outside the arbitration agreement.*

EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d at 462 (emphasis added).

[19/](...continued)
Charge Statistics FY 1992 Through FY 200), *available at* http://www.eeoc.gov/stats/charges.html (as of January 18, 2001) and http://www.eeoc.gov/litigation.html (as of January 31, 2001).

[19/] *Id.*

It is, therefore, inconceivable that the EEOC's pursuit of monetary relief for charging parties in its enforcement actions will have any effect on agreements to arbitrate.

CONCLUSION

The decision of the court below incorrectly resolves the competition between the federal policy favoring arbitration and the effective enforcement of the nation's civil rights laws in favor of arbitration on the basis of what amounts to speculation that the EEOC's litigation of victim-specific relief significantly impacts the compulsory arbitration of discrimination claims. By holding that the EEOC may not litigate individual relief for an employee bound by an arbitration agreement, the lower court has profoundly restricted the ability of the EEOC to act in the public interest without any demonstration that such litigation affects significantly, if at all, the federal policy favoring arbitration. On the other hand, that decision thwarts the express will of Congress, which gave the EEOC the meaningful enforcement power now jeopardized in the uncertain name of arbitration. Because the decision below inflicts great harm on the enforcement of civil rights without conferring any articulable benefit on the arbitration process, AARP respectfully urges this Court to reverse the court below and hold that the congressionally granted EEOC enforcement powers are unaffected by private agreements to arbitrate.

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IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 64 national and international labor organizations representing 13 million working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, authorizes the Equal Employment Opportunity Commission to bring federal court suits in its own name and on its own and the public's behalf seeking, among other forms of relief, "reinstatement . . . of employees, with . . . backpay (payable by the employer . . . responsible for the unlawful employment practice)." 42 U.S.C. § 2000e-5(g)(1). In order to avoid what the Fourth Circuit perceived as a policy conflict between this provision of Title VII and the Federal Arbitration Act, the court below ruled that the EEOC may not seek reinstatement and back pay for a charging party who had agreed to arbitrate employment disputes with his employer.

By authorizing the EEOC to bring suit, the 1972 amendments were intended to provide the Commission with an independent coercive enforcement power that is complete in itself and that is sufficient to move recalcitrant employers into compliance with Title VII. The most potent remedies in this respect are those that threaten employers with monetary liability for disobeying the federal anti-discrimination laws.

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made monetary contribution to the preparation or submission of this brief.

By depriving the EEOC of just these potent remedies, the decision below substantially defeats the purpose of the 1972 amendments.

There is nothing in the Federal Arbitration Act that even implicitly limits the enforcement authority of the EEOC. The FAA was intended to make arbitration agreements enforceable on the same footing as other contracts. As a general matter, a contract is only enforceable against the parties to the agreement. The EEOC has not agreed to arbitrate any dispute. And, the charging party who has agreed to arbitrate does not have authority to enter into a private agreement with an employer that deprives the Commission of an essential aspect of its law enforcement authority.

ARGUMENT

This lawsuit, brought by the Equal Employment Opportunity Commission pursuant to the enforcement procedure stated in Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, arises from the discharge of a Waffle House employee allegedly in violation of the Americans with Disabilities Act ("ADA"). *See* 42 U.S.C. § 12117(a).

At this juncture, as the Fourth Circuit stated, the question presented is:

> [W]hether and to what extent the Equal Employment Opportunity Commission ("EEOC"), in prosecuting a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer. [Pet. App. 1a-2a].

That question was generated by the following particulars:

> (i) Waffle House requires applicants for employment to complete a "generic, corporation-wide employment application" containing an "arbitration provision," Pet. App. 7a, "requiring the applicant to submit to binding arbitration 'any dispute or claim concerning Applicant's

> employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc, or the terms, conditions or benefits of such employment,'" Pet App. 3a;
>
> (ii) the EEOC brought suit against Waffle House—on the basis of charges filed by an employee who had completed an application including the arbitration provision—alleging that the Company had discharged the employee in violation of the ADA and seeking an injunction requiring that Waffle House cease such unlawful practices, institute anti-discrimination programs, and reinstate the discharged employee, as well as backpay and compensatory and punitive damages, *id.* at 4a; and
>
> (iii) Waffle House responded by filing a petition under the Federal Arbitration Act to compel the EEOC to take its case to arbitration and a motion to stay or dismiss the EEOC's lawsuit, *id.*

The correct answer to the question posed by the Court of Appeals is that the EEOC—which has no arbitration agreement with Waffle House—"in prosecuting a suit in its own name," is *not* "bound by," or otherwise limited by, "a private agreement between the charging party and his employer."

The answer given by the court below, in contrast, was:

> (1) that the EEOC cannot be compelled by reason of an arbitration agreement between the charging party and his employer, to arbitrate its claims, but (2) that, to the extent that the EEOC seeks to obtain "make-whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum. [Pet. App. 2a.]

The Court of Appeals fashioned that limitation on the EEOC's litigation authority out of what that court characterized as "competing federal polic[ies]" reflected in the Title VII enforcement scheme and the Federal Arbitration

Act ("FAA"). Pet. App. 14a. According to the court below, "[t]he EEOC's public mission to eradicate and to prevent discrimination . . . cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims." *Id.*

But there is no Title VII/FAA conflict that justifies any such judicially-created limitation on the EEOC's litigation authority stated in Title VII—as we now show.

A. Title VII, as amended in 1972, puts in place a dual EEOC public-law-enforcement/"person aggrieved" private-party-law-enforcement scheme. The salient point here is that the public law enforcement component of that scheme lodges in the EEOC a litigation authority to bring suit in its own name and on the public's behalf to remedy unlawful discriminatory practices that is both complete in itself and independent of, and indeed paramount to, the separate private party litigation authority accorded to aggrieved persons to bring a suit against the discriminatory practice in question.

In this regard, "Title VII sets forth an integrated, multistep enforcement procedure that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984). "[F]ollow[ing] a straightforward reading of the statute," § 706 of Title VII "authorize[s] the EEOC to sue in its own name to enforce the federal law by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act." *General Telephone Co. v. EEOC*, 446 U.S. 318, 324-325 (1980).[2] When the EEOC exercises that authority the Commission is the plaintiff both in name and in fact and the

[2] Section 706 provides that an action to enforce a claim may be brought by a person aggrieved in the event that "the Commission has not filed a civil action" or "entered into a conciliation agreement to which the person aggrieved is a party" within 180 days after the filing of a charge. 42 U.S.C. 2000e-5(f)(1).

claims stated in the complaint are the EEOC's claims; "the EEOC is not merely a proxy for the victims of discrimination and . . . the EEOC's enforcement suits should not be considered representative actions." *Id.* at 326.

Section 706, first of all, expressly authorizes "the Commission [to] bring a civil action against any [private] respondent" in the appropriate United States district court. 42 U.S.C. § 2000e-5(f)(1). That section also specifically provides that "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the [EEOC's] complaint the court"

> may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. [42 U.S.C. § 2000e-5(g)(1).]

As the *General Telephone* Court put the point:

> Section 706(f)(1) specifically authorizes the EEOC to bring a civil action against any respondent not a governmental entity upon failure to secure an acceptable conciliation agreement, the purpose of the action being to terminate unlawful practices and to secure appropriate relief, including "reinstatement or hiring . . ., with or without back pay," for the victims of the discrimination. See § 706 (g). [446 U.S. at 323-324 (footnote omitted).]

See Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 133 (1995).

In assessing the meaning and effect of § 706, it is particularly pertinent that as originally enacted Title VII did not grant the EEOC any enforcement authority and that "the recalcitrance of many employers compelled Congress in 1972 to strengthen the EEOC's investigatory and enforcement powers." *Shell Oil*, 466 U.S. at 77. The aim of the 1972 amendments was precisely to arm the EEOC with "coercive enforcement powers," so that the Commission would be more than a "conferee, conciliator and uncoercive persuader." *EEOC v. General Electric Co.*, 532 F.2d 359, 372 (4th Cir. 1976). The Senate Report explained the source of the "impasse between EEOC and the employer[s]" that "played a large part in the present failure of Title VII," S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971), as follows:

> The employer realizes that any attack on its policies by the EEOC presents largely an ineffectual threat. To comply with the Commission's interpretation of a problem, and to accord the appropriate relief, is a purely voluntary matter with the respondent with no direct legal sanctions available to EEOC. This absolute discretion available to respondents has not proven conducive to the success of Title VII objectives. In cases posing the most profound consequences, respondents have frequently ignored the EEOC's findings, preferring rather to chance the unlikelihood that the complainant will pursue his claim further through the costly and time-consuming process of court enforcement. The social consequences have been extreme.[3]

Underscoring the dissatisfaction with Title VII's original enforcement scheme, the Senate Report added that "the Congressional establishment of the EEOC without adequate enforcement" means had "proved to be a cruel joke to those

[3] *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 11 (1971) ("one of the main advantages of granting enforcement power to a regulatory agency is that the existence of the sanction encourages settlement of complaints before the enforcement stage is reached").

complainants who ha[d] in good faith turned to the Federal government with the complaint of discrimination." *Id.* at 8. The obvious solution to this problem was to "provid[e] the Commission with effective power to enforce Title VII." *Id.* at 28.

The 1972 grant to the EEOC of authority to secure back pay awards for discriminatees was central to achieving the Congressional purpose, for the reasons this Court cogently stated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). "The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions." *Id.* at 416. Given the "economic character" of the discrimination Title VII was intended to eliminate, *id.* at 418, "[b]ackpay has an obvious connection with this purpose," *id.* at 417:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (CA 8 1973). [422 U.S. at 417-418.]

Putting the foregoing together, the overall purpose of the 1972 amendments was this:

> As Title VII was originally enacted as part of the Civil Rights Act of 1964, the EEOC's role in eliminating unlawful employment practices was limited to "informal methods of conference, conciliation, and persuasion." Civil actions for enforcement upon the EEOC's inability to secure voluntary compliance could be filed only by the aggrieved person. § 706 (e), 78 Stat. 260. Congress became convinced, however, that the "failure to grant the EEOC meaningful enforcement powers has proven

> to be a major flaw in the operations of Title VII." S. Rep. No. 92-415, p. 4 (1971). The 1972 amendments to § 706 accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII. In so doing, Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. [*General Telephone*, 446 U.S. at 325-326 (footnote omitted).]

Of equal moment here, the structure of the Title VII enforcement scheme enacted in 1972 reflects "the congressional contemplation . . . that there should be primary reliance upon the powers of enforcement . . . conferred upon the Commission, and not upon private lawsuits, to achieve equal employment opportunity." *EEOC v. Cleveland Mills Co.*, 502 F.2d 153, 156 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). The court below accurately catalogued the essentials of the independent law enforcement authority complete in itself that Congress granted to the EEOC in the public interest:

> In order to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact, a charging party "may not proceed to federal district court until . . . the EEOC has made its own determination as to the validity of complainant's claim and issued a right-to-sue letter." *Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 138 (4th Cir. 1995). And if the EEOC chooses to file suit, the charging party may not bring his own suit; his right is them limited to intervening in the EEOC's suit. *See* 42 U.S.C. § 2000e-5(f)(1). * * * In addition, once the EEOC decides to sue in its own name, it is not limited to the facts presented in the charge. Rather, the EEOC may sue based on "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *General Tel.*, 446 U.S. at 331; *see also General Elec.*, 532 F.2d at 370. Finally, the EEOC's independent interest is also reflected in the fact that a charging party may not withdraw his charge without the consent of the EEOC. *See* 29 C.F.R. § 1601.10. [Pet. App. 9a-10a.]

To draw out the implications of the last two points, the EEOC has express authority to bring suit to vindicate the rights of discriminatees who have never filed a charge with the Commission and of charging parties who wish to withdraw their charge from the Commission. Beyond that, the EEOC may itself initiate a case without any discriminatee having filed a charge by proceeding on a Commissioner's charge. 42 U.S.C. § 2000e-5(b). In addition the statute expressly empowers "the Commission [to] bring a civil action" where "the Commission has been unable to secure . . . a conciliation agreement *acceptable to the Commission*" without regard to whether the discriminatee and the employer who engaged in the discriminatory practice have entered into a private conciliation agreement or some other private settlement. 42 U.S.C. § 2000e-5(f)(1) (emphasis added).[4]

As all this makes plain, "[t]he Commission has the basic responsibility to achieve the objectives of Title VII." H.R. Rep. No. 92-238, p. 14. As a means to that end, and most particularly to encourage compliance with the federal anti-discrimination laws, the EEOC has been granted by Congress an independent public law enforcement authority to seek the full range of remedies for discriminatory practices stated in § 706. Such an EEOC suit—including a suit concerning discrimination against named discriminatees seeking reinstatement and back pay for the discriminatees—is law

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[4] Conversely, the statute allows an aggrieved person to bring suit 180 days after the charge was filed if "the Commission has not filed a civil action . . . or the Commission has not entered into a conciliation agreement *to which the person aggrieved is a party*." *Id.* (emphasis added).

enforcement for and on behalf of the public; "the EEOC is not merely a proxy for the victims of discrimination and . . . the EEOC's enforcement suits should not be considered representative actions." *General Telephone*, 446 U.S. at 326.

Against that background what the Fourth Circuit rule denying the EEOC authority to seek back pay where the discriminatees in question have signed arbitration agreements would do is to recreate the situation the 1972 amendments were intended to remedy, i.e., one in which "the EEOC presents largely an ineffectual threat" because "no direct legal sanctions [are] available to EEOC." S. Rep. No. 92-415, at 5. The only sanction left to the EEOC by the decision below is injunctive relief. As this Court has recognized, this is insufficient in that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper*, 422 U.S. at 417. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess. 69 (1991) ("when back pay is not available . . . there is simply no deterrent"). And, the threat of back pay liability through arbitration proceedings brought by individual claimants will provide little deterrence, because, just as occurred under the 1964 Civil Rights Act, "respondents [will] more often than not shrug[] off the Commission's entreaties and rel[y] upon the unlikelihood of the parties suing them." H.R. Rep. No. 92-238, p. 9.

The Sixth Circuit was surely correct in its assessment that "limiting the EEOC to the pursuit of injunctive and not monetary relief on behalf of aggrieved individuals would severely impede its ability to protect the public interest against unlawful employment discrimination, and would effectively eradicate the efforts of Congress to provide meaningful enforcement powers to the EEOC." *EEOC v. Frank's Nursery*, 177 F.3d 448, 466 (6th Cir. 1999).

B. Contrary to the understanding of the Fourth Circuit, the Federal Arbitration Act and its policy favoring arbitration do

not provide any basis for limiting the authority of the EEOC "to secure appropriate relief, 'including reinstatement . . . with or without back pay,' for the victims of [employment] discrimination." *General Telephone*, 446 U.S. at 324.

The FAA—which was enacted almost a half-century before the federal anti-discrimination laws—"makes a written agreement to arbitrate '. . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

As the statutory language shows, "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). "Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors*, 473 U.S. at 626. For, under the FAA, as under all contractual arbitration regimes, "a party cannot be required to arbitrate any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986).

It follows that nothing in the FAA's terms, and nothing in the FAA policy favoring arbitration—both of which draw their essence from the law of contracts—grant the parties to an arbitration agreement the right to limit the litigation authority conferred by a statute upon an independent third party.

As the court below correctly observed, "the EEOC is not a party to any arbitration agreement," Pet. App. 12a, and has not agreed to submit any matter to arbitration. Thus, the FAA provides no basis for applying that agreement to the EEOC.

The only arbitration agreement here is the arbitration provision in Waffle House's employment application, and it runs to the individuals who have completed the application and only to those individuals. That agreement, at its most, binds those individuals to proceed on their employment claims—including claims under the ADA—through arbitration rather than through their own private-party lawsuit. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. ___ (March 21, 2001).

By reason of the FAA, then, the charging party here is barred from exercising what would otherwise be his right to file a private-party Title VII lawsuit, and he may be barred from intervening in an EEOC lawsuit to independently press his claim. *See* 42 U.S.C. § 2000e-5(f)(1)(according such rights to "persons aggrieved" by discriminatory practices). In this case, the charging party has not so much as attempted to take either of these steps.

The one step the charging party has taken is to file charges with the EEOC alleging a Waffle House violation of the ADA. That step in no way offends the FAA, or the FAA policy favoring arbitration: "An individual . . . claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Nor is the FAA's arbitration policy in any way offended by the EEOC lawsuit brought here. The sole point of the FAA policy favoring arbitration agreements is to bind the parties to an agreement to pursue the legal claims they otherwise have the right to pursue through court litigation through arbitration instead. The FAA and the FAA arbitration policy are not directed at third persons who are strangers to an arbitration agreement or at granting the contracting parties the power to place limits on third party litigation.

That being so—and the EEOC's Title VII public law enforcement litigation authority being separate and distinct from an aggrieved person's private-party law enforcement authority—the Fourth Circuit stretched the FAA and its arbitration policy far beyond their limits in making the Waffle House arbitration provision the predicate for a judicial limitation on the EEOC's litigation authority. Pet. App. 14a.

C. For the reasons just stated, we do not believe there is any cognizable conflict between the EEOC's public law enforcement authority to bring this case and the FAA policy favoring arbitration to be resolved by balancing the Title VII enforcement policy against the FAA's arbitration policy. But assuming that there is such a conflict, the proper balance is in favor of the Title VII enforcement policy and not, as the Court of Appeals concluded, against it.

The Fourth Circuit was of the view that "[t]o permit the EEOC to prosecute in court [a charging party's] individual claim [for reinstatement and back pay]—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong policy favoring arbitration," and that "only a stronger, competing policy could justify allowing the EEOC to do for [the charging party] what [he] could not have done himself." Pet. App. 14a. And, according to the court below, "[t]he EEOC's public mission to eradicate and to prevent discrimination . . . cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims," because "the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief" in that "the EEOC [is] seek[ing] primarily to vindicate private, rather than public, interests." *Id.* at 14a-15a. *See EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 301 (2d Cir. 1998)("in seeking individual monetary relief, as opposed to class-wide injunctive relief, the EEOC does not represent the public interest to the same degree").

In other words, in order to generate a policy conflict between Title VII and the FAA, the court below had to treat the reinstatement/backpay remedies provided for by the statute as peculiarly individual in their nature and of less importance from a Title VII law enforcement perspective than the other remedies specified in the statute. That approach—which is contrary to the express terms of § 706, which do not so distinguish among the various remedies described there—is directly at odds with the Congressional purpose in granting the EEOC litigation authority.

As we have seen, a back pay order under Title VII is "a reparation order designed to vindicate the public policy of the statute." *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). *See Albemarle Paper*, 422 U.S. at 419; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 774-775 & n. 34 (1976). The EEOC does not seek such relief as the representative of the charging party, but rather as the public law enforcement agency charged with "the basic responsibility to achieve the objectives of Title VII." H.R. Rep. No. 92-238, at 14.

This Court has instructed that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper*, 422 U.S. at 421. The rule adopted by the Fourth Circuit frustrates both of these interrelated statutory purposes by making it impossible for unlawful discrimination to be completely redressed in a single enforcement proceeding brought by the EEOC. That, of course, significantly diminishes the incentives for employers to comply with the law in the first instance or, in the second, to come to effective conciliation agreements with the Commission curing violations.

Employer-employee arbitration agreements of the sort at issue in this case have become ubiquitous. *See, e.g., Cole v.*

Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997). And, as this case demonstrates, such agreements are commonly imposed on the entire complement of an employer's workforce. *Id.* at 1477 ("mandatory arbitration agreements in individual employees' contracts often are presented on a take-it-or-leave-it basis"). Thus, the decision below blunts the enforcement authority of the EEOC with respect to the numerous employers who require their employees to sign standard-form arbitration agreements by freeing such employers from the "reasonably certain prospect of a backpay award," *Albemarle Paper*, 422 U.S. at 417, in actions brought by the EEOC.

On any calculus, that harm outweighs the highly attenuated harm to the FAA arbitration policy of recognizing the legitimacy of a statutorily authorized Title VII public law enforcement suit by the EEOC—which as we have emphasized is not party to any arbitration agreement—that in substance parallels the private-party Title VII suit a discriminatee could have brought but for his arbitration agreement with the employer who committed the discriminatory practice. The employer, we would emphasize, has contracted for arbitration with his employees—and only with his employees—against (i) the background of the arbitration law, which makes it plain that the agreement does not apply to third persons not party to the agreement, and (ii) against the background of the Title VII law, which makes it plain that the EEOC has an independent public law enforcement authority "to secure appropriate relief, including 'reinstatement . . ., with or without back pay,' for the victims of discrimination." *General Telephone*, 446 U.S. at 324.

D. The Second Circuit, in reaching the same conclusion as the court below, relied more heavily on the theory that an individual charging party and the EEOC are in privity, asserting that "Congress intended the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights." *Kidder, Peabody*, 156 F.3d at 302. This

theory is as defective as the Fourth Circuit's Title VII/FAA conflict theory. Simply stated, "preclusion cannot apply because the EEOC and [the individual charging party] are not in privity, and because they do not possess identical causes of action or interests." *Frank's Nursery*, 177 F.3d at 463.[5]

The privity analysis in *Kidder, Peabody* is fatally at odds with this Court's decision in *General Telephone*, which as we have noted, squarely holds that "the EEOC is not merely a proxy for the victims of discrimination and . . . the EEOC's enforcement suits should not be considered representative actions." 446 U.S. at 326. It was on this ground that the Court *rejected* the proposition that "a judgment in the EEOC's suit . . . will be binding upon all individuals with similar grievances." *Id.* at 332. Rather, the Court suggested "that the courts can and should preclude double recovery by an individual" through such means as "requir[ing] any individual who claims under its judgment to relinquish his

[5] The Fourth Circuit. in the decision below, did not rely on the Second Circuit's privity analysis, perhaps, because that analysis "relied in large measure on the 'distinctive enforcement scheme of the ADEA.'" *Kidder, Peabody*, 156 F.3d at 301, quoting *EEOC v. United States Steel Corp.*, 921 F.2d 489, 494 (1990). In *U.S. Steel*, the Third Circuit emphasized that the Age Discrimination in Employment Act both "expressly authorizes aggrieved individuals to bring civil actions" and "provides that 'the right of any person to bring such actions shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under [the Act].'" 921 F.2d at 494, quoting 29 U.S.C. § 626(c)(1). The Third Circuit concluded "that Congress would not have crafted this enforcement scheme—on the one hand, creating an individual cause of action and, on the other, cutting off the individual's right to sue once the EEOC begins its action—unless Congress intended for the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights." 921 F.2d at 494-495. Whatever merit these observations may have with respect to the ADEA, they have no application whatsoever to the Americans with Disabilities Act or to Title VII generally, neither of which provide for the termination of individual lawsuits upon the filing of an action by the EEOC.

right to bring a separate private action." *Id.* at 333.

Even accepting the proposition that "the doctrine of claim preclusion applies symmetrically to instances in which litigation by a representative precedes individual litigation and to those instances in which the opposite sequence occurs," *U.S. Steel*, 921 F.2d at 493, it follows from *General Telephone* that the EEOC, which is an independent litigant and not a representative, is not barred from seeking reinstatement/back pay relief for an individual by the result of an individual's action. Indeed, that conclusion follows *a fortiori*, for the argument against preclusion of the government's claim by the result of an individual's private-party lawsuit is even stronger than the argument against preclusion of the individual's claims by the government's lawsuit. *See Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) ("the Government is not barred by the doctrine of *res judicata* from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commence or concluded."); *Restatement (Second) of Judgments* § 41, Comment d (1982) ("Where a private party is recognized as having a right to secure judicial redress with regard to a matter in which a public official or agency also has such a right, the private party's action is not ordinarily preclusive of an action by the official or agency.").

As we have explained, the statutory language refutes the notion, also relied upon by the Second Circuit, *Kidder Peabody*, 156 F.3d at 302, that "a prior private settlement may limit the scope of relief that the EEOC may seek on behalf of the settling employee," *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987). Section 706(f)(1) states that "[if] . . . the Commission has been unable to secure from the respondent a conciliation

agreement *acceptable to the Commission*, the Commission may bring a civil action against any respondent . . . named in the charge." 42 U.S.C. § 2000e-5(f)(1)(emphasis added). Obviously, then, the Commission is *not* limited in "bring[ing] a civil action" by a conciliation agreement that is *not* "acceptable to the Commission."

In regard to this point, the *Kidder, Peabody* opinion incorrectly describes three cases cited by this Court in *Gilmer* as standing for the proposition that "an individual's settlement or waiver of a claim under the ADEA preempted a subsequent EEOC action on that claim seeking damages for the individual." 156 F.3d at 301. But none of these cases involve any contention that the EEOC was preempted by a private-party settlement agreement, and none of them even remotely address this question. Rather, each one addresses whether an *individual's private party* settlement agreement bars a later action by *that individual*. *See Coventry v. United States Steel Corp.*, 856 F.2d 514, 522 (3d Cir. 1988); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033 (8th Cir. 1986); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1045 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986). These cases are cited in *Gilmer* for the proposition that ADEA "disputes can be settled . . . without any EEOC involvement," 500 U.S. at 28, a statement which is indisputably true where the EEOC does not invoke its Title VII public law enforcement litigation authority but which has nothing to do with the binding effect of private settlements on the EEOC when the Commission does bring such a suit.

This is not to say that an individual's private party settlement has no effect on the back pay recovery in a suit brought by the EEOC. The statute expressly precludes double recovery by injured employees, 42 U.S.C. § 2000e-5(g)(1), and any amount previously received by an individual pursuant to a private settlement should undoubtedly be deducted from the back pay awarded to that individual in a

suit brought by the EEOC. Moreover, the amount recovered in a freely and fairly negotiated settlement may be given appropriate weight by the district court in determining the amount of lost wages. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n. 21 (1974). But neither of these considerations has any application to the instant case where the charging party has neither received any money in settlement of his claim nor attempted to recover any money through arbitration. *See Frank's Nursery*, 177 F.3d at 465 ("Here, [the charging party] neither received satisfaction of her interests through settlement, nor agreed to give up her right to back pay.").

In the end, the Second Circuit's privity analysis rests on the mistaken idea underlying the Fourth Circuit's decision "that in seeking individual monetary relief, as opposed to class-wide injunctive relief, the EEOC does not represent the public interest to the same degree." *Kidder, Peabody*, 156 F.3d at 301.

CONCLUSION

The decision of the court of appeals dismissing the EEOC's claims for backpay, reinstatement and compensatory and punitive damages should be reversed.

Respectfully submitted,

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In the
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INC.,

Respondent.

Brief of the States of Missouri, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Utah, Vermont, West Virginia and the Commonwealth of the Northern Mariana Islands In Support of Petitioner

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QUESTION PRESENTED

Whether a victim's agreement to arbitrate disputes with another person bars a government law enforcement agency, as plaintiff in an enforcement action against that other person, from obtaining victim-specific monetary remedies such as backpay and damages.

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e-Bay User Agreement 19, 21-22

No. 99-1823

In the
SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INC.,

Respondent.

Brief of the States of Missouri, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Utah, Vermont, West Virginia and the Commonwealth of the Northern Mariana Islands
In Support of Petitioner

INTEREST OF AMICUS CURIAE

The amici are all attorneys general – and thus the chief law enforcement officers – of their respective states and territories. They have varying amounts of authority to prosecute criminal cases. But each of them uses civil tools to enforce a wide range of laws. Among those laws are ones regulating business practices in areas of the economy where mandatory arbitration agreements either are already in

common use, or could easily be used. The Fourth Circuit's holding could permit contracting by private parties to foreclose suits by the amici where the state seeks monetary relief that is measured by losses to victims of illegal acts, even where those victims unknowingly accepted terms buried in fine print, where the money will eventually flow to the victims themselves, rather than remain in state coffers. The amici seek to defend their continued ability to use civil law enforcement actions as a tool to enforce not just civil rights, but consumer protection and other laws that protect the welfare of individual citizens.

SUMMARY OF ARGUMENT

The amici ("attorneys general" herein) work with and often represent state agencies responsible for enforcing civil rights laws that largely parallel the statute under which the Equal Employment Opportunity Commission sought to proceed in this case. Employment, housing, and other transactions to which those civil rights laws apply typically involve written contracts – contracts that could easily include mandatory arbitration clauses. When the attorneys general seek to enforce the civil rights laws, their goal is to ensure that persons and corporations in their states comply with the law generally, not just to address the needs of a single victim. That is true even when the tool the attorneys general use is one that measures the monetary penalty according to individual loss.

The rule adopted by the U.S. Court of Appeals for the Fourth Circuit ignores that goal. It erases the critical distinction between the role of the EEOC, the state civil rights agencies, and the attorneys general on the one hand, and that of private attorneys representing private parties on the other. It concludes that merely because the government calculates monetary payments according to a victim's losses,

its law enforcement efforts are restricted by an arbitration clause entered into by the victim, as to which the government was never a party. Thus an employer or landlord, by forcing individual employees or tenants to individual arbitration, can prevent the government from effectively attacking even a pattern or practice of discrimination.

That alone is enough to argue strongly against affirming the Fourth Circuit's rule. But there is more, for the rule is not limited to the employment context. Nor is it limited to discrimination claims. Rather, it could have an adverse impact on many other law enforcement efforts by the attorneys general.

In particular, the Fourth Circuit's rule could adversely affect efforts by the attorneys general to enforce deceptive practices and other consumer protection statutes. The individual stakes in such cases are often much smaller than those in employment and housing cases. Those smaller stakes are proportionally harder to vindicate through individual actions. Often the purchasers lack the sophistication or means to pursue even arbitration – particularly when it involves large up-front fees or requires hearings at distant locations. Small individual stakes and the buyers' lack of assets or knowledge are typical of the situations in which class actions and consumer protection actions by attorneys general are brought. But a new sort of mandatory arbitration clause is specially designed to preclude class actions – thus leaving the attorneys general as the last bastion of protection for many victims. The Fourth Circuit's rule could severely damage that bastion.

The attorneys general do not suggest that the Court reverse its consistent case law permitting the enforcement of arbitration clauses as to individual plaintiffs. In fact, attorneys general have used arbitration and other forms of

alternative dispute resolution to address many problems, including consumer complaints. But in those instances, the attorneys general or other third-party or government agencies have a key role in defining the scope, availability, cost, and consequences of arbitration. Thus there is an independent check on the process that ensures its fairness to individual consumers. If permitted to cut government law enforcement out of areas of the economy where mandatory arbitration agreements are becoming common, the Fourth Circuit's rule would effectively deprive many deceived consumers of effective redress. And it would have a dramatic impact on the deterrent effect of consumer protection laws.

ARGUMENT

I. The attorneys general cannot be barred, by an arbitration agreement to which the state was not a party, from enforcing state civil rights laws.

States are free to enact fair employment practice legislation,[1] and virtually every state has done so. [2] Their statutes often stretch well beyond the discrimination in employment that is the subject of the Equal Employment Opportunity Commission's jurisdiction, reaching discrimination in housing and other economic sectors.[3] The States' strong local interests in enforcing those anti-discrimination laws[4] are imperiled by the Fourth Circuit's holding.

Most states have established enforcement agencies to investigate charges of discrimination and enforce their laws.[5] Like the EEOC, the state agencies are not merely surrogates for individual victims of discrimination. Rather, they have independent authority to investigate violations of and to enforce laws addressing discrimination – again, not just discrimination in employment – based on disability, race, and other characteristics. For example, the California Director of Fair Employment and Housing may file complaints to enforce California's Fair Employment and Housing Act.[6] The Missouri Commission on Human Rights is empowered "to eliminate and prevent discrimination."[7] The New Jersey Division on Civil Rights "may compel compliance" with, or

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[1] *Colorado Anti-discrimination Comm'n v. Continental Airlines, Inc.*, 372 U.S. 714, 721-22 (1963). *See also DeCanas v. Bica*, 424 U.S. 351, 356 (1976)(states possess broad authority under their police powers to protect workers within their borders).

[2] The States' statutes are identified and described in detail in *Fair Employment Practices Manual* (BNA) 453:1-458:9991.

[3] *See, e.g.*, Alaska Stat. § 18.80.240 (2000); 775 Ill. Comp. Stat. 5/3-102 (1993); Md. Code Ann. Art. 49(B), § 3(c) (2000); Minn. Stat. § 363.03 (2000); Mo. Rev. Stat. § 213.040 (2000).

[4] *See, e.g., Bucyrus-Erie Co. v. The Dep't of Industry, Labor and Human Relations of the State of Wisconsin*, 599 F.2d 205, 207 n.1 (7th Cir. 1979); *Westinghouse Elec. Corp. v. State of Maryland Comm'n on Human Rights*, 520 F.Supp. 539, 542 (D. Md. 1981).

[5] *Fair Employment Practices Manual* (BNA) 451:1 and 451:201 (directory of state and local employment practices agencies).

[6] 2000 Cal. Stat. 12960.

[7] Mo. Rev. Stat. § 213.030(1) (2000).

"prevent violations of" New Jersey's Law Against Discrimination.[8] The South Dakota Commission of Human Rights is empowered to file charges for violations of the state's Human Relations Act.[9] Just as the EEOC represents the federal government's interests, such state agencies represent the interests of the state.[10] In fact, such state agencies never cease to represent the interests of the state, even when proceeding on an individual victim's claim of

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[8] N.J. Stat. Ann. §§10:5-14.1, -14.1a, and -17 (1993).

[9] S.D. Codified Laws § 20-13-29 (1995).

[10] In practice, it is the state or local authority, not the authority retained by the EEOC, that is most often invoked to address employment discrimination claims. In fact, the EEOC must defer initial processing of such claims to a state or local authority where there are comprehensive state laws, the authority has adequate investigatory and enforcement powers, and the authority has applied for deferral status. *Fair Employment Practices Manual* (BNA) 451:2, citing 42 U.S.C. § 2000e-5(c) (1995). State and local authorities that have been so designated account for initial processing of 60% of the job discrimination charges that the EEOC receives. *Id.* at 451:1. And of course, charges may also be filed directly with a state or local authority at the outset. Placing even more responsibility in the hands of state and local authorities, the EEOC may certify a designated authority. Certification means that the EEOC will accept the findings and resolutions of such authorities upon a lower level of review. *Id.* at 451:1. Designated or certified state and local authorities are listed in *Fair Employment Practices Manual* (BNA) 403:19.

discrimination. Representing the state or the public interest is something that private litigants cannot do.[11]

The effect of the Fourth Circuit's holding on state agencies' efforts to enforce their laws is, potentially, no different from its effect on the EEOC. Limiting the ability of the state agencies and the EEOC to pursue monetary relief would negatively impact the ability of those enforcement entities to protect citizens against unlawful discrimination.[12] This Court has recognized that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."[13] It is the prospect of having to pay back wages that in many cases "'provides the spur or catalyst'" for change in discriminatory employment practices.[14] Most state legislatures recognize that a potential award of back pay is an important facet of their overall plans to eradicate discrimination within their borders, and have given their enforcement authorities the power to award such damages, in addition to injunctive relief.[15]

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[11] *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 458 (6th Cir. 1999)(whenever EEOC sues in its own name, it represents the public interest).

[12] *EEOC v. Frank's Nursery*, 177 F.3d 448 at 466.

[13] *Albemarle Paper v. Moody*, 422 U.S. 405, 417 (1975).

[14] *Id., quoting U.S. v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973) (also describing back pay awards as playing "a crucial role in the remedial process").

[15] *E.g.* Alaska Stat. § 18.80.130(2)(1) (2000); Ariz. Rev. Stat. § 41-1481.G (1992); 2000 Cal. Stat. 12970; Fla. Stat. § 760.11(5) (1997); Minn. Stat. § 363.03 (2000); Mo.

The Fourth Circuit's holding could also hamper the States' and the EEOC's enforcement abilities in an even more fundamental way. In fulfilling their duties to enforce civil and human rights laws, these agencies must, despite their investigatory and subpoena power, depend on individual victims of discrimination not only to cooperate with them at the investigation phase, but to alert them at the complaint filing phase. But individual victims simply may never come forward at all, when faced with the prospect, as here, of binding arbitration where contract clauses place the substantial costs of arbitration in their laps. One circuit judge aptly noted below that such provisions make "[any] accessible forum ... in effect, unavailable, because of the disincentive to arbitrate created by such fees."[16] Under such circumstances, a victim in effect loses all recourse. And an enforcement agency does not, as a practical matter, have the opportunity to learn of the problem and step in, whether to seek damages

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Rev. Stat. § 213.075.11(1) (2000); Ohio Rev. Code § 4112.05(G)(1) (2001); S.D. Codified Laws § 20-13-42 (1995). States vary in whether their statutes also permit the imposition of monetary penalties, and as to the size of those penalties. For example, the cited statutes of Alaska, Arizona, Florida, Minnesota, Missouri, and Ohio do not refer to monetary penalties such as fines, though the California and South Dakota statutes do. *See* 2000 Cal. Stat. 12970 (permitting actual damages and an administrative fine not to exceed $150,000, plus a civil penalty not to exceed $25,000); S.D. Codified Laws § 20-13-47 (1995) (permitting a fine up to $10,000 for willful or repeat violations of Commission orders). Clearly many states do not deem penalties, even with injunctive relief, to be sufficient, standing alone, to deter violations of civil rights laws.

[16] *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 817 n.8 (1999)(King, J., dissenting).

or injunctive relief. Both are critical to agency enforcement efforts.

The Fourth Circuit's holding also glosses over the fact that the EEOC is never a party to a private arbitration agreement. Certainly state enforcement agencies would never be parties, either. Aside from the obvious absurdity of binding third parties such as the EEOC or a state agency with a private contract, especially where a private litigant cannot and does not represent the public interest, this case presents the situation in which the need for government enforcement is particularly acute. Though amici recognize that arbitration, in general, can be an effective tool of dispute resolution, the reality is that pre-dispute employment arbitration agreements are often treated with a healthy dose of skepticism. Some legal scholars oppose such mandatory arbitration.[17] And some states have codified their skepticism by specifically exempting employer-employee pre-dispute arbitration agreements from enforcement.[18] This Court's decision in *Circuit City Stores*

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[17] *See, e.g.*, Katherine Eddy, *To Every Remedy a Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts*, 52 HASTINGS L.J. 771 (2001); Victoria J. Crane, *The Mandatory Arbitration Clause: Forum Selection or Employee Coercion?*, 8 B.U. PUB. INT. L. J. 537 (1999); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (Winter 1998); and Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

[18] *E.g.* Ark. Stat. Ann. 16-108-201 (Supp. 1999); Conn. Gen. Stat. § 46a-85 (2001); Iowa Code 679A.1 (2001); and Kan. Stat. Ann. 5-401 (1999).

v. Adams[19] that the Federal Arbitration Act applies to employment contracts does not ameliorate that skepticism. Appropriately, it makes no judgment as to the value of arbitration in such contracts.

The skepticism over employer-mandated arbitration in the context of a civil rights claim is based, in part, on the apparent limitations of the arbitration forum. While specialized agencies such as the EEOC and the States' enforcement agencies have developed and apply expertise in the area of discrimination, arbitrators need have no such expertise.[20] Nor are they required to follow case law – which may lead to "particularly unpredictable" results.[21] Despite that unpredictability, there are trends – and they are troubling. While "[p]laintiffs are estimated to win nearly 70% of the 25,000 wrongful discharge and discrimination cases filed in state and federal courts nationwide,"[22] the same is not true in arbitration. A study demonstrated that an employer who is arbitrating for the first time is as likely to lose in arbitration as in court.[23] But where the employer is a "repeat player" (has arbitrated before), that risk drops dramatically – to

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[19] 121 S.Ct. 1302 (2001).

[20] *See Department of Fair Employment and Housing v. American Airlines, Inc.*, 1991 CAFEHC LEXIS 18, *37-39 (Ca. Fair Emp. & Housing Comm'n March 7, 1991).

[21] Eddy, *supra* n. 17, at 777.

[22] *Id.*

[23] Bingham, *supra* n. 17, at 234 (employers arbitrating for the first time are likely to lose 70% of the time).

16%.[24] The amount that employees recover where their employers are repeat players is also statistically less than in cases involving employers arbitrating for the first time.[25] These statistics may explain why "the number of companies choosing to require mandatory arbitration of employee disputes is on the rise."[26] And they explain why the States need to preserve the ability to themselves address discrimination – particularly systematic discrimination – despite mandatory arbitration clauses to which they obviously were not parties.

When enforcing their anti-discrimination laws, the states are vindicating not just the federal policy before the Fourth Circuit, but their own policies. The Fourth Circuit did not, of course, address those state policies in the context of the purely federal claim before it. But unless this Court reverses or limits the Fourth Circuit's holding, it could become an effective shield against enforcement of the States' policies. As a matter of logic, the Fourth Circuit's holding, grounded as it purports to be in "the competing federal policy favoring the enforcement of arbitration agreements" and striking a "balance" between federal anti-discrimination and pro-arbitration policies,[27] should not extend beyond federal law. While this Court has said that the Federal Arbitration Act "pre-empts those state employment laws which restrict or limit the ability of employees and employers to enter into

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[24] *Id.*

[25] *Id.*

[26] Eddy, *supra* n. 17, at 777.

[27] 193 F.3d at 812.

arbitration agreements,"[28] it did so only in the context of private disputes in which the rights of the individual plaintiffs who had agreed to arbitrate were at stake, not in the context of state (or federal) agencies protecting public policy and the public interest. No decision of this Court limits the power of state agencies acting in the public interest to enforce state law.

States that choose to enact anti-discrimination or other laws regulating employment should be free to strike their own balances, by statute or through the common law. That freedom is threatened in this case. The Fourth Circuit's majority "relie[d] on its own assumptions about corporate practices, as if those are somehow dispositive of the question whether an agreement to arbitrate has been formed."[29] Courts applying that holding might improperly rely on assumptions about state law. That would wrongly curtail powers left to the States under our federalist system. Accordingly, even if this Court were to uphold the Fourth Circuit's ruling as an interpretation of *federal* anti-discrimination law, it should clarify that the states, including those whose laws against discrimination are enforced by amici, remain free to strike a different balance and to permit state agencies to enforce state law.

II. The attorneys general cannot be barred, by an arbitration agreement to which the state was not a party, from enforcing consumer protection laws.

Although this case arises from the use of an arbitration clause in an employment agreement, the Fourth Circuit's rule is not, by express limitation or by its rationale, restricted to

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[28] *Circuit City*, 121 S. Ct. at 1312.

[29] 193 F.3d at 817 (King, J., dissenting).

that context. Nor is it limited to the context of the civil rights laws. Indeed, the Fourth Circuit's rule may affect *any* action where the underlying transaction involves an arbitration clause. Thus it threatens a wide range of actions in which attorneys general would otherwise seek to enforce the law by using restitution or damages as tools. Attorneys general use those actions to attack practices that result in small individual, but large collective losses. In those instances, the attorneys general act where individual claimants may lack the economic means or the economic incentive to act. The actions of the attorneys general, much like class actions brought by private counsel, are intended in part to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[30] But again, they are also intended to enforce the law generally – to create a deterrent against fraud, deceit, discrimination, and other ills.

Though such actions may be brought in a wide variety of contexts, attorneys general have been particularly active in the area of consumer protection. "As of 1977, 48 states plus Puerto Rico and Guam had enacted consumer protection laws."[31] Many of them are "little FTC Acts," "meant to complement the deceptive practices jurisdiction of the [Federal Trade Commission]."[32] Such laws are "modeled

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[30] *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997), *quoted with approval*, *Amchem Prods. v. Windsor*, 521 U.S. 591, 616 (1997).

[31] *Purity Supreme, Inc. v. AG*, 380 Mass. 762, 407 N.E. 2d 297, 304 n. 11 (Mass. 1980).

[32] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 973 P.2d 527, 551 n. 2, 83 Cal.Reptr.2d 548 (Cal. 1999) (Kennard, J.

after the Federal Trade Commission Act, which prohibits 'unfair and deceptive acts and practices.'"[33] In most states, the laws are enforced by the attorney general.[34] When an attorney general files an action under such an act – even if the action seeks restitution, as it often does – the suit "is essentially a law enforcement action designed to protect the public, not to benefit private parties."[35]

The attorneys general have used consumer protection laws to attack deceptive and unfair practices in a wide variety of industries. For example, attorneys general have obtained relief against health insurance companies that permitted providers to charge co-pays based on a theoretical "full price" rather than the price actually negotiated with the insurer, and against cellular telephone companies that round up to the next minute even after one second without adequately notifying customers. They have initiated investigations and filed actions to address a wide variety of complaints in long distance telephone service, most prominently carriers that switch residential customers to their systems, sometimes with high initial and switching fees and usually with higher rates, based on deceptive documents – colloquially called "slamming." Many of the actions taken by the attorneys general are prompted by consumer complaints. The pattern of such complaints highlights the potential for mischief presented by the Fourth Circuit's rule. As a sample, during

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dissenting).

[33] *State ex rel. Nixon v. Telco Directory Publishing*, 863 S.W.2d 596, 601 (Mo. banc 1993).

[34] *Purity Supreme*, 407 N.E. 2d at 304 n. 11.

[35] *People v. Lann*, 225 Ill.App.3d 236, 587 N.E. 2d 521, 524 (Ill. App. 1992).

March 2001, the Missouri Attorney General's Consumer Complaint Unit logged 2074 complaints – most of them in areas such as time shares, consumer finance and credit, telephone service, and automobile sales. In all of these and many areas of concern to the attorneys general, there are written notices and agreements into which a mandatory arbitration clause could be inserted.

To date, the effect of mandatory arbitration clauses in these and other areas addressed by the attorneys general has been very limited. But a collision between those clauses and the States' law enforcement efforts is inevitable. This Court has confirmed the enforceability of arbitration agreements in a wide variety of contexts.[36] Businesses are building on that foundation, rapidly expanding their use of such agreements into new areas of our economy. Unfortunately, the economic incentives that encourage that trend sometimes encourage the use of techniques designed to take advantage of consumers and others who lack the economic incentive to pursue their claims when faced with the burdens of, and sometimes offered only limited benefits by, arbitration.[37] In some industries, consumers who manage to read the fine print, understand it, and persevere to seek out an alternative supplier can avoid such techniques by choosing a supplier that does not insist on arbitration, or at least one that offers a

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[36] *E.g.*, *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[37] *See* Jean R. Sternlight, *Panacea of Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 680-86 (1996).

consumer-friendly arbitration process. But choices may be limited in some industries.

Consumers have no choice whether to use arbitration when an entire industry uses arbitration clauses. And the use of industry-wide arbitration is neither new nor unusual. "For over a hundred years, so-called self-regulatory organizations ... such as the New York Stock Exchange have established arbitration programs for resolution of consumer claims against brokerages."[38] This Court has upheld decisions compelling arbitration under such programs.[39] More recently, mandatory arbitration has become nearly universal in other fields. Thus today it is standard to find, buried in the small print of the rules included in credit card solicitations, a clause requiring arbitration of disputes with the card provider. Similar clauses are inserted, with little notice, into the rules covering existing credit card accounts. Some companies have gone so far as to add a purportedly retroactive clause *after* a class action against the company has been filed but before the class is certified, in a transparent attempt to prevent participation in the class.[40] That expansion has not generally been successful.

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[38] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 45 n. 169 (Oct. 2000).

[39] *E.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

[40] *See, e.g., Marsh v. First USA Bank,* NA, 103 F. Supp. 2d 909 (N.D. Tex. 2000); *Carnegie v. H&R Block, Inc.*, 687 N.Y.S.2d 528 (N.Y. Sup. Ct. 1999); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999); *Bodie v. Bank of America*, 67 Cal.App.4th 779, 79 Cal. Rptr. 2d 273 (Cal. App. 1st Dist. 1998).

But it demonstrates the lengths to which some companies will stretch an industry's penchant for arbitration.

Though in most industries arbitration is not yet pervasive, it is present and rapidly becoming common in a wide variety of consumer transactions. Among the recent reported cases involving such clauses are ones involving insurance,[41] automobile sales,[42] franchises,[43] consumer loans,[44] and cellular telephone phone service.[45] The clauses are showing up in form contracts used in a variety of transactions

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[41] *Appleton Papers, Inc. v. The Home Indemnity Co.*, 235 Wis.2d 39, 612 N.W. 2d 760 (Wis. App. 2000); *Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.*, 752 So. 2d 55 (Fla. 2000); *Fireman's Fund Ins. v. Bugailisluis*, 278 Ill.App.3d 19, 662 N.E. 2d 555 (Ill. App. 1996); *Graham v. State Farm Mutual Automobile Ins. Co.*, 565 A.2d 908, 912 (Del. 1989).

[42] *Capitol Chevrolet & Imports v. Granthan*, 2000 Ala. LEXIS 490 (2000); *Lozada v. Dale Baker Oldsmobile*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000); *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998).

[43] *Bishop v. We Care Hair Development Corp.*, 316 Ill.App.3d 1182, 738 N.E. 2d 610 (Ill. App. 2000); *We Care Hair Development Corp. v. Engen*, 180 F.3d 838 (7th Cir. 1999); *KKW Enterprises v. Gloria Jean's Gourmet Coffees*, 184 F.3d 42 (1st Cir. 1999).

[44] *Johnson v. West Suburban Bank*; 225 F.3d 366 (3d Cir. 2000); *American General Finance v. Branch*, 2001 Ala. LEXIS 78 (2001).

[45] *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. App. 1999).

involving consumers, such as real estate purchases.[46] They are being used to regulate the ability of patients to pursue complaints about health insurance,[47] physicians,[48] managed care organizations,[49] and nursing homes.[50] And they now appear in many of the parts of the economy where attorney generals have found consistent patterns of deceptive practices being used on relatively unsophisticated and economically

[46] *Johnson v. Siegel*, 84 Cal. App. 4th 1087, 101 Cal. Rptr 2d 412 (Cal. App. 6th Dist. 2000).

[47] *United Benefit Life Ins. Co. v. Collins*, 2001 WL 273902 (N.D. Ala. 2001).

[48] *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (Ariz. 1992); *Obstetrics & Gynecologists William G. Wixted, et al., v. Pepper*, 101 Nev. 105, 693 P.2d 1259 (Nev. 1985).

[49] *In re Managed Care Litigation*, 132 F. Supp. 2d 989 (S.D. Fla. 2000); *Broughton v. Cigna Healthplans of Calif.*, 21 Cal.4th 1066, 988 P.2d 67, 90 Cal.Reptr. 334 (Cal. 1999); *Erickson v. Aetna Health Plans of Calif.*, 71 Cal. App. 4th 646, 84 Cal.Reptr. 76 (Cal. App. 4th Dist. 1999).

[50] *Condee v. Longwood Management Corp.*, 88 Cal.App.4th 215, 105 Cal. Rptr. 2d 597 (Cal. App. 4th Dist. 2001).

disadvantaged consumers, such as home repairs,[51] mobile home sales,[52] and "pay day" loans.[53]

The move toward mandatory arbitration clauses has been accelerated by the arrival of "e-commerce." The purchase of goods and services on the Internet involves written agreements and long distance relationships that lend themselves to the imposition of mandatory contractual terms. The clauses are accessible only through multiple "links" or "clicks," and even then only by scrolling through lengthy "terms and conditions" pages. For example, the most popular Internet auction site, "eBay," includes a clause seventeen paragraphs into its "User Agreement" that requires its customers to use arbitration – and provides that the arbitration take place in San Jose, California, that it cannot be consolidated with other arbitrations, and that it conform to rules that can impose considerable costs on the person seeking arbitration:

> Any legal controversy or legal claim arising out of or relating to this Agreement or our services, excluding legal action taken by eBay to collect our fees and/or recover damages for, or obtain an injunction relating to, the eBay site operations, intellectual property, and our

[51] *Williams v. Aetna Finance Co.*, 88 Ohio St. 3d 464, 700 N.E. 2d 859 (Ohio 1998).

[52] *Oakwood Acceptance Corp. v. Hobbs*, 2001 Ala. LEXIS 4 (2001); *Johnnie's Homes, Inc. v. Holt*, 2001 Ala. LEXIS 8 (2001); *Dobbins v. Hawk's Enterprises*, 198 F. 3d 715 (8th Cir. 1999).

[53] *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E. 2d 854 (W. Va. 1998).

> services, shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. Any such controversy or claim shall be arbitrated on an individual basis, and shall not be consolidated in any arbitration with any claim or controversy of any other party. The arbitration shall be conducted in San Jose, California, and judgment on the arbitration award may be entered into any court having jurisdiction thereof. . . .[54]

Such terms inhibit the ability of consumers in distant states and territories to enforce their rights – especially when the dispute involves small dollar amounts.

The impact of mandatory arbitration clauses is further exacerbated by changing demographics. The 1990 Census showed that nearly 6 million U.S. residents lived in households that were "linguistically isolated," *i.e.*, there was

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[54] The eBay "User Agreement" is available at http://pages.ebay.com/help/community/png-user.html (visited May 24, 2001). The "commercial arbitration rules of the American Arbitration Association" (AAA) referred to in the eBay agreement include filing fees starting at $500 on claims below $10,000, though the fee might be waived in some undefined set of circumstances. Effective March 15, 2001, the AAA has set out a separate set of "Arbitration Rules for the Resolution of Consumer-Related Disputes," which provides for an initial $125 fee for consideration of a paper record and an additional $100 for a telephone hearing, but refer the consumer back to the commercial rules for an in-person hearing. The AAA rules and fee schedules are available at http://www.adr.org/ under "Focus areas: Commercial" (visited May 24, 2001).

no resident over age 14 who spoke English well.[55] Though the language data for the 2000 Census has not been released, if it tracks the dramatic increases in the number of Hispanic and Asian residents, the number of "linguistically isolated" households will have risen to more than nine million.[56] The language problems of those making purchasing decisions in those households makes their residents more likely to unknowingly agree to mandatory arbitration. And for them, the arbitration process is particularly difficult, for the rules of the major arbitration groups lack any promise of translation assistance.

If the Fourth Circuit's rule is upheld, the increased use of mandatory arbitration agreements may severely and adversely impact the effectiveness of efforts of attorneys general to protect consumers at all income levels and with all degrees of English proficiency. Yet the attorneys general may already be the last bastion of protection where numerous consumers have small claims but lack the economic power to vindicate their rights and force changes in behavior. Though class actions have often shared that role, the arbitration industry has discovered and actively promoted methods of preventing consumers and others from pursuing relief as a

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[55] U.S. Census Bureau, Table 3. Language Use and English Ability, Persons 18 Years and Over, by State: 1990 Census, available at http://www.census.gov/population/-socdemo/language/table3.txt (visited May 24, 2001).

[56] In the 1990 Census, 29,627,721 residents listed Hispanic or Asian as their race; in the 2000 Census, the total was 45,548,807. For further discussion of the increase in Hispanic population, see Betsy Guzmán, *The Hispanic Population* (U.S. Census 2000 Brief Series, May 2001), available at http://www.census.gov/prod/2001pubs/-c2kbr01-3.pdf (visited April 30, 2001).

class.[57] Companies using mandatory arbitration seek to prevent class actions because they "know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable."[58] Thus they have increasingly used express bars on class relief.[59] Those bars follow the pattern shown in the eBay User Agreement: They prohibit an individual claim in arbitration from being "consolidated in any arbitration with any claim or controversy of any other party."[60] That strategy, "[i]f successful, . . . would permit any company that has an ongoing relationship with a potential plaintiff–such as an insurer, manufacturer, cruise ship or HMO–to use a contract of adhesion to require that person, typically unknowingly, to arbitrate rather than litigate, and to explicitly bar that person from proceeding by way of class action."[61]

The anti-class-action arbitration strategy has been subject to attack by plaintiffs and their lawyers. But companies defending such provisions have themselves brought the issue back to the point that so concerns the amici attorneys general. When faced with plaintiffs' claim that eliminating class actions blows a huge hole into enforcement of consumer protection laws, such companies have pointed in

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[57] *See* Sternlight, *supra* note 38, at 5 n. 2.

[58] Sternlight, *supra* note 38, at 9.

[59] *See* Sternlight, *supra* note 38, at 6.

[60] e-Bay User Agreement, *supra* note 54.

[61] Sternlight, *supra* note 38, at 10-11 (footnotes omitted).

defense directly to enforcement by government agencies.[62] Recently the U.S. Court of Appeals for the Third Circuit, upholding an agreement barring class actions in *Johnson v. West Suburban Bank*,[63] accepted that argument. It pointed to the continued existence of "administrative enforcement mechanisms" to rebut a claim that to bar class actions would severely undermine the effectiveness of the Truth in Lending Act.[64] But that argument is premised on the continued ability of the government to pursue those who engage in fraudulent or deceptive practices. And again, that ability is threatened by the Fourth Circuit's rule.

The attorneys general recognize that the Fourth Circuit's rule permits the use of penalties and injunctive relief – as the Third Circuit pointed out in the context of federal law enforcement in *West Suburban Bank*.[65] But at least as applied to state consumer protection laws, the Third Circuit's analysis is problematic. It presupposes – falsely – that there is a practical alternative for the victims. It presupposes – again, falsely – either that the government's interest is solely to enforce the law prospectively, or that enforcement limited to the future is an effective deterrent to misbehavior today.

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[62] *E.g.*, Brief of The Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, *Green Tree Financial Corp. v. Randolph*, No. 99-1235, 1999 U.S. Briefs LEXIS 1235, *22 (Federal Trade Commission's restitution authority can be used to protect consumer rights under the Truth in Lending Act even where there are arbitration agreements).

[63] 225 F.3d 366 (3d Cir. 2000).

[64] *Id.* at 375.

[65] *Id.*

And it forces the curious conclusion that the public is better off – and that Congress and the state legislatures intended to leave them – with penalties flowing into the public treasury than with restitution flowing to those suffering actual loss. [66] There is nothing in the Third Circuit's opinion, or in any decision cited by that court, to explain such a conclusion.

Moreover, the Third Circuit's analysis is in the context of banking, a closely supervised industry where there are frequent opportunities for federal agencies to observe and attack violations of the law. The state consumer protection laws have a much broader range, and are most often enforced by the attorneys general outside the regulated industry context. As to the consumer protection laws, it is critical to recognize that it may be possible to insert a mandatory arbitration clause in virtually every consumer transaction with written documents, either paper or electronic. Thus the Fourth Circuit's rule might ultimately permit those selling goods ranging from time shares to used automobiles, services ranging from long distance telephone service to driveway resurfacing, and even those engaged in pyramid schemes to point to arbitration clauses and proclaim immunity from actions by the attorneys general that reach nefarious past acts. That would be true even though the attorneys general appear as plaintiffs, seeking to enforce the law.[67]

Even when an attorney general appears as a plaintiff, vindicating the public interest and enforcing state law, the recovery may be measured in terms of consumer loss. The

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[66] The Third Circuit's analysis does not address, of course, instances in which penalties are not available. *See* note 15, *supra*.

[67] *See, e.g., In the Matter of Towers*, 162 F.3d 952, 956 (7th Cir. 1998).

funds recovered may even flow, directly or indirectly, to consumers. But neither the measurement nor the identity of the ultimate recipient changes the fact that suits brought under consumer protection statutes are law enforcement actions, intended to eliminate the incentive to deceive by ensuring the disgorgement of ill-gotten profits. This Court should prevent the Fourth Circuit (and other state and federal courts that might follow its rule) from forcing the law and the States down a road that leads, as a practical matter, to a place where unnumbered consumers who have been deceived, but who lack the ability to pursue or have lost sums too small to justify even the costs of individual arbitrations, are left without effective protection. Arbitration certainly has an important role even in consumer law. But it should not be handed to the unscrupulous as a shield from government efforts to attack consumer deception after the fact.

CONCLUSION

Because of the threat it poses to the effective enforcement by the States of their civil rights, consumer, and other laws, the Court should reverse or limit the Fourth Circuit's holding and affirm the ability of the States to enforce their laws even when the tool they use measures relief and ultimately results in payments to victims who signed contracts that included mandatory arbitration clauses.

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IN THE
SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center ("Center")[1] is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who report misconduct in the workplace or testify in proceedings to enforce federal law. The Center supports employees who have suffered illegal retaliation due to the disclosure of matters in the public interest. The Center regularly assists employees who have filed viable claims of retaliation under state and federal anti-retaliation laws and participates in public education programs throughout the country. The Center also operates, *pro bono*, an Attorney Referral Service for whistleblowers (with attorney members in 38 states) and maintains an Internet web site at *www.whistleblowers.org*.

Persons assisted by the Center have a direct interest in the outcome of this case. Over twenty federal laws containing prohibitions against employee retaliation also contain administrative enforcement procedures either identical or substantially similar to the provisions at issue in this case. Affirming the decision of the Fourth Circuit could have the direct impact of undermining a carefully-constructed Congressional framework for protecting employee-

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[1] Pursuant to Rule 37.6, no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that the Center's attorneys, Stephen M. Kohn, Michael D. Kohn, David K. Colapinto, authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amicus curiae* brief by the National Whistleblower Center.

whistleblowers under numerous laws, in addition to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 2000e-3(a), specifically at issue here.

This case is of particular concern to the National Whistleblower Center. Almost all federal whistleblower protection laws rely upon an enforcement mechanism similar to the one employed by Congress in the ADA. Whistleblowers tend to be very unpopular plaintiffs, and are typically at a disadvantage *vis a vis* employers. Accordingly, Congress has enacted statutory schemes designed to carry out the federal policy of protecting whistleblowers, and has empowered a number of federal agencies to administer those laws and uphold the federal policies at stake. Similar to the powers given the Equal Employment Opportunity Commission ("EEOC") under the ADA, these federal agencies are authorized to seek relief in federal court for individual whistleblowers who serve the public interest, including the enforcement of back pay and reinstatement awards.

Any limitations on the power of these agencies to properly protect whistleblowers would fundamentally undermine the detailed Congressional framework which has created a safety net for employees who blow the whistle on public safety violations in a number of sensitive areas, such as nuclear safety, airline safety, mine safety, surface transportation safety, and environmental protection, among many others.

Since 1990 the Center has participated before this Court as *amicus curiae* in a number of cases that directly impact on the rights of employee whistleblowers, including *English v. General Electric*, 496 U.S. 72 (1990), *Haddle v. Garrison*, 525 U.S. 121 (1999), and *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).

SUMMARY OF THE ARGUMENT

Since 1935 Congress has entrusted the executive branch of government with the discretion to enforce important public polices that can come under fire in the workplace. Over twenty statutes are based on this model, including the ADA. Congress recognized the case-by-case "difficulties" of enforcing these polices and consequently established agencies, such as the EEOC, to ensure that important federal policy would not be undermined by illegal employer action.

In granting executive agencies authority to vindicate congressionally-sanctioned policy, Congress also empowered these agencies, pursuant to Article I of the United States Constitution, with the authority to determine the "relation of remedy to policy," an authority this Court has long recognized. The lower court in this case failed to heed this Court's warning against "the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy," when it drastically limited the EEOC's enforcement authority.

The EEOC has the discretion to determine the relationship between remedy and policy in all cases in which it seeks to enforce the ADA and the important policies that Act stands for. In this case, the lower court abused its discretion when it determined that the EEOC may only seek prospective relief against employers who violate the ADA. The Fourth Circuit's holding directly undermines the well-established discretion the EEOC has to determine which remedies further the federal policies it is entrusted by Congress to enforce.

Moreover, in addition to the ADA, twenty other federal laws are based on enforcement principles either identical or similar to those in the ADA. Upholding the lower court ruling in this matter could threaten the administrative and judicial enforcement process in all of these laws. Such a result would

undermine the carefully constructed enforcement process established by Congress over a sixty-year period.

Finally, the decision of the lower court is completely inconsistent with the policies underlying the Federal Arbitration Act and this Court's decision in *Circuit City Stores v. Saint Clair Adams*, __ U.S. __, 121 S.Ct. 1302 (2001) . As this Court has recognized, one of the benefits of arbitration is permitting both employees and employers to enjoy the benefits of a fast, fair and inexpensive process to vindicate statutory rights. Under the process endorsed by the lower court, however, employees and employers could be forced to defend employment decisions in two separate ongoing proceedings - one before an arbitration panel and another before the EEOC. Instead of being inexpensive and in accordance with federal arbitration policy, the costs of such cases could easily double.

Additionally, the adjudication process in both cases may be distorted due to the application of the *res judicata* and collateral estoppel doctrines. Permitting multiple litigation of the same or similar claims in two separate fora would undermine all of the reasons why the *res judicata* and collateral estoppel rules exist.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT DOES NOT DISPLACE THE EEOC'S ADMINISTRATIVE AUTHORITY TO DETERMINE THE APPROPRIATE REMEDY NECESSARY TO EFFECTUATE FEDERAL POLICY IN A DISCRIMINATION CASE.

The lower court fundamentally misunderstood the EEOC's discretion to evaluate the remedy it would seek in a discrimination case with the EEOC's Congressionally-

mandated duty to effectuate the national policy of eliminating the harms caused by illegal discrimination. Its failure to properly weigh this Court's longstanding rule that agencies, such as the EEOC, have the primary duty to determine the relationship between remedy and policy in eradicating illegal employment practices mandates that the decision of the lower court be reversed.

The lower court erred when it held that the "public interest" in determining issues such as back pay and reinstatement, were "minimal," and somehow outside of the EEOC's "primary" mission of protecting "public" interests. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999). This holding is at war with the fundamental premises underlying most federal anti-discrimination laws. Since the enactment of the National Labor Relations Act in 1935, Congress has, on numerous instances, empowered Article I administrative agencies with the authority of protecting the public interest by policing employment practices which interfered with interstate commerce or other federal rights for which Congress, under the U.S. Constitution, had the authority to regulate. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937).

In upholding administrative agencies' authority to police employment practices made illegal by Congress, this Court has also recognized that part of that enforcement authority includes the power of agencies to seek judicial enforcement of orders of "reinstatement" or "payment for lost time." *Id.*[2] This Court has also firmly recognized that neither

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[2] Title VII of the Civil Rights Act of 1964, *as amended*, established the EEOC to implement "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal court." *Occidental*

(continued...)

an employee nor an employer may interfere with this power through the execution of a private contract. *J.I Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act").

The lower court's holding that an award of back pay to an employee somehow had only a "minimal" impact on the broader public interest cannot be sustained as a matter of law. Congress vested the EEOC with the discretion to determine the relationship between the remedy sought in an action filed by the Commission, and the Commission's obligation to advance the broader public interest. Again, sixty years ago this Court recognized the fundamental relationship between a "remedy" and the effectuation of a policy. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). In *Phelps Dodge*, this Court held that an administrative agency's "power to neutralize discrimination"

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[2] (...continued)
Life Insurance Company v. EEOC, 432 U.S. 355, 359 (1977). When Congress created the EEOC in 1964, it "established an administrative procedure" for resolving discrimination claims. In 1972 the EEOC was granted "additional enforcement power" to seek enforcement of discrimination laws in federal court. Despite its ability to file claims in federal court, "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination . . . ." *Id.*, pp. 367-68. This Court has noted the difference between suits which merely represent a private interest and those filed by administrative agencies in order to protect a public interest. *General Telephone Company v. EEOC*, 446 U.S. 318, 333 (1980) (noting "possible differences between the public and private interests" involved in Title VII litigation).

was not limited in cases in which an employee may already have obtained "compensatory" relief. The agency's power was not "limited" to remedying private harms, but extended to effectuating "public policy. *Id.*, pp. 192-93.

In the context of eradicating harmful employment practices prohibited by law, Congress empowered agencies to determine the "relation" between the necessary "remedy" in a particular case, to the "policy" for which the agency was established to enforce. *Phelps Dodge*, 313 U.S. at 194.

Although decided sixty years ago in the context of evaluating the powers of the National Labor Relations Board, the analysis of this Court in *Phelps Dodge* is equally applicable to the issued raised by the lower court in order to determine the scope of discretionary authority vested in the EEOC to determine what remedy to seek for an employee when weighing its duty to protect the public interest as a whole. This Court left no doubt that Article I agencies, such as the NLRB or EEOC, have the discretion to make this threshold determination, and that courts must be extremely limited in second-guessing that judgment, as a matter of law:

> Congress met these difficulties [*i.e.*, in determining the proper scope of a remedy] by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, the courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board

> implies responsibility – the responsibility of exercising its judgment in employing the statutory powers.

Phelps Dodge, 313 U.S. at 194.[3]

This holding is equally true in the context of the EEOC's exercise of its discretion in cases arising under the ADA. First, determining what relief is necessary to effectuate Congress' policy goals in any particular case is a "difficult" issue, and one which Congress left with the EEOC, if and when the EEOC chooses to exercise its discretion to file a claim. Just as with the NLRB, Congress clearly vested considerable discretion with the EEOC in formulating its demand for relief in any case filed in federal court.

Second, because of the relationship between remedy and policy, courts must be very wary of interfering with the EEOC's discretion in this area. Of course, a court can refuse to award any damage requested by the EEOC if such an award is not permissible under the act or is not supported by the evidence. However, removing the EEOC's authority to even request such relief in a complaint, or attempt to create a record that would justify such relief, unquestionably oversteps the bounds of judicial restraint, and upsets the regulatory and

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[3] Congress is "presumed to know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-99, 99 S.Ct. 1946 (1979). When Congress passed the Civil Rights Act of 1964 and the amendments thereto in 1972, it knew of agencies' authority to determine the appropriate remedy to effectuate federal policy, as set forth in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)(recognizing agency discretion in formulating a proposed remedy); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)(recognizing that private contracts must yield to a congressionally-sanctioned enforcement regime).

enforcement scheme developed by Congress.[4] This Court's warning to the lower courts "against the danger of sliding unconsciously" into the "spacious domain of policy" in which Congress granted the NLRB is equally applicable to the EEOC. It is well established that Congress empowered the EEOC with a "spacious domain" to enforce the ADA and thereby effectuate the federal policies Congress intended when it enacted the ADA into law.

Third, Congress' grant of "power" to the EEOC to investigate and file claims against employers concerning illegal employment practices also "implies responsibility." Clearly, the EEOC does not file such claims in every case. Even when claims are filed, the EEOC must act with proper "responsibility" in determining what relief to seek, and what forum should be used to obtain that relief.

Although this case arose in the context of the ADA, since 1935 Congress has used the NLRA as a model for passing

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[4] It is well-settled that "agency enforcement decisions" are generally "committed to agency discretion." *FEC v. Akins*, 524 U.S. 11, 26, 118 S.Ct. 1777 (1998), *citing Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1469 (1985). Consequently, there is no authority which would permit a district court to micro-manage or second-guess the types of relief the EEOC may request when engaging in its "multi-step enforcement procedure." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1997). In fact, permitting such micro-management at the complaint and discovery phase of a legal action could significantly add to the complexity and expense incurred by all parties engaged in the EEOC enforcement process.

numerous laws which effectuate other national labor polices.[5] Any decision by this Court limiting the discretion of the EEOC to determine the proper "remedy" in an employment case would have an extremely detrimental impact on numerous laws in addition to the civil rights statutes directly implicated in the Fourth Circuit's holding. *See, e.g.*, Aviation Whistleblower Protection Provision, 49 U.S.C. § 42121(c)(5) (Secretary of Labor discretion to file civil action to enforce law and seek compensatory damages); Clean Air Act Employee Protection, 42 U.S.C. § 7622(d) (Secretary of Labor discretion to file civil action to enforce law and seek compensatory and exemplary damages); Employee Polygraph Protection Act, 29 U.S.C. § 2005(b) (Secretary of Labor discretion to file civil suit obtaining lost wages and benefits for employees); Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3) and 216 (Secretary of Labor discretion to file civil action to enforce law); Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855 (Secretary of Labor duty to file civil action to enforce law); Mine Health and Safety Act, 30 U.S.C. § 818 (Secretary of labor discretion to file civil action to enforce law); Occupational Health and Safety Act nonretaliation provision, 29 U.S.C. § 660(c) (Secretary of Labor discretion to file civil action to enforce law); Safe Containers for International Cargo Act Employee Protection Provision, 46 U.S.C. § 1506

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[5] *See* Legislative History of Titles VII and XI of Civil Rights Act of 1964 at p. 3077 (GPO 1968), *reprinting* various legal memoranda placed into the Congressional Record by Sen. Clark during the 1964 debates concerning the Civil Rights Act. For example, one memorandum placed on the record by Sen. Clark noted that "starting with the National Labor Relations Act," Congress had "enacted comprehensive legislation regulation labor and management practices." The memorandum also noted that "prior statutes," which included the NLRA, were "directly analogous to the provisions of title VII."

(Secretary of Labor discretion to file civil action to enforce law); Safe Drinking Water Act Employee Protection Provision, 42 U.S.C. § 300j-9i(4); Surface Transportation Act Employee Protection Provision, 49 U.S.C. § 31105(d) (Secretary of Labor duty to file civil action to enforce law); Toxic Substances Control Act Employee Protection Provision, 15 U.S.C. § 2622(d) (Secretary of Labor duty to file civil action to enforce law).

Clearly, Congress was free to rely on this Court's holding in *Phelps Dodge* in empowering administrative agencies to protect employees under other laws, and entrusting those agencies to properly determine the relationship between "remedy" and "policy" in enforcing those other laws. Should this Court uphold the lower court's ruling, the power of these agencies to administer and enforce the vital national policies effectuated under numerous laws would be either directly undermined or, at a minimum, called into question.

The EEOC has the discretion to determine the relationship between remedy and policy in all cases in which it, in its discretion, seeks to vindicate the policies of the ADA. The lower court erred when it overturned the EEOC's exercise of that discretion.

II. INTERFERING WITH THE EEOC'S DISCRETION TO DETERMINE THE APPROPRIATE REMEDY TO EFFECTUATE FEDERAL POLICY WOULD DEFEAT CONGRESS' PURPOSE IN PASSING THE FEDERAL ARBITRATION ACT.

In *Gilmer*, this Court acknowledged that the EEOC retained certain powers to pursue claims under anti-discrimination laws, despite the existence of an arbitration agreement executed by two private parties. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). This

holding is fully consistent with the legislative history of the Civil Rights Act of 1964, as amended. *EEOC v. Frank's Nursery & Crafts*, 177 F.3d 448, 456-59 (6th Cir. 1999).

In this case, however, the lower court justified limiting the EEOC's right to request various remedies for victims of discrimination. The lower court held that a dual procedure for enforcing the national policy against illegal employment discrimination must be utilized. On the one hand, the EEOC could adjudicate broad class actions and seek "injunctive" relief for victims of discrimination in federal court, while on the other hand, issues of individual monetary relief arising from the same incident had to be resolved through arbitration. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, (4th Cir. 1999).

This holding is illogical and completely inconsistent with the Congressional purposes behind the Federal Arbitration Act and this Court's holding in *Circuit City Stores v. Saint Clair Adams*, __ U.S. __, 121 S.Ct. 1302 (2001) . If the holding of the lower court were followed, employees, employers and the government would, in many cases, have to bear the burdens and risks of dual adjudications. *Circuit City*, __ U.S. __, 121 S.Ct. 1313 (warning against judicial holdings which could result in the "bifurcation of proceedings" subject to arbitration, thereby increasing both litigation costs and the burden on the courts).

For example, an instance of discrimination could easily give rise to both an individual claim for relief (which, under the Fourth Circuit's holding, must be handled in an arbitral forum) and a claim for broad injunctive relief, which the EEOC would file in a federal court. Because many (if not all) of the facts relevant to one proceeding, would also be relevant to the other, the employer could find itself having to pay double-attorney fees. *Circuit City*, __ U.S. at __, 121 S.Ct. at 1313 (permitting parties to "avoid the costs of litigation" is a major "benefit" of arbitration). The employer would be forced to defend the same

alleged discriminatory action twice.

Moreover, because of the potential impact of *res judicata* and *collateral estoppel*, the EEOC may find itself forced to intervene in the arbitration proceeding, and the employee may be forced to intervene in the EEOC proceeding. Witnesses would have to testify twice, different forums could issue contradictory decisions on every issue, ranging from credibility determinations to controlling factual and a plethora of legal questions may be litigated concerning which requested remedy must be arbitrated or litigated. *See, e.g. Circuit City Stores, supra* (warning against judicial holdings which may create "complexity and uncertainty" and cast doubt on the "efficiency of alternative dispute resolution procedures").

To make matters even worse, Congress recognized that understanding employment discrimination was becoming "increasingly complex," especially to an "untrained observer." Equal Employment Opportunity Act of 1972, H. Rep. No. 92-238, *reprinted* 1972 U.S.C.C.A.N. 2137, 2144. To ensure that the "national policy of equal employment opportunity" could be enforced "in a meaningful way," Congress enhanced the enforcement authority of the EEOC in 1972. 1972 U.S.C.C.A.N. at 2138. Establishing a precedent which would permit dual litigation in multiple fora would undermine the national policy to promote equal employment opportunity by artificially adding complexity and uncertainty when none need exist. *Circuit City Stores* strongly counsels against interpreting the FAA in such a manner.

In short, the very reason for requiring arbitration in employment cases (*i.e.* lowing costs, efficient resolution, administrative convenience, etc.) and for applying the doctrines of *res judicata* and collateral estoppel in any case, would be fundamentally undermined by upholding an enforcement regime that not only permitted and encouraged the unnecessary bifurcation of proceedings, but essentially required such

duplication in *all* cases in which the EEOC determined that major issues impacting the public policy existed.

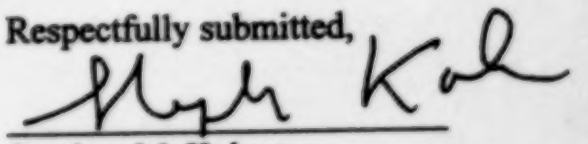
A claim of discrimination - like any other law suit - must be resolved in one proceeding. In the case below, the employee and the employer both agreed to an arbitration forum. However, the EEOC did not agree to that forum. In such a circumstance, the interests of the private parties must bend to the greater public interest, as represented by the EEOC. *J.I Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility").

Of course, the EEOC may exercise its discretion in choosing the forum in which a claim should be heard, and may very well prefer in any given case to have a claim resolved through arbitration. This decision rests in the sound discretion of the EEOC, and private parties may not invalidate the exercise of that discretion through private contract.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,



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May 25, 2001

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No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION, AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The National Employment Lawyers Association ("NELA"), the American Civil Liberties Union ("ACLU"), and Trial Lawyers for Public Justice ("TLPJ") submit this brief as *amici curiae*.

NELA, a voluntary membership organization of more than 3,000 attorneys nationwide, is the country's only professional membership organization of lawyers who regularly represent workers in employment, labor, and civil rights disputes. As part of its advocacy efforts, NELA regularly supports litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that those laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); and *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 69 U.S.L.W. 4195 (2001).

NELA is very familiar with the mandatory arbitration issues involved in this case, as in recent years, thousands of American workers represented by NELA's members have been forced to execute mandatory pre-dispute

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[1] The parties to this case have consented to the filing of this brief as provided for in the Rules of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

employment arbitration agreements as a non-negotiable condition of their employment. NELA and its members have thereby developed a unique perspective on the issues raised by these agreements and their specific impact on workers who have suffered workplace discrimination.

The American Civil Liberties Union is a nationwide, nonprofit and nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Women's Rights Project of the ACLU has, in particular, appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*, in cases involving the interpretation of those civil rights laws and the proper role of the EEOC in enforcing the federal antidiscrimination mandate. Because this case raises those questions once again, its resolution is a matter of significant concern to the ACLU and its members.

TLPJ is a national public interest law firm that specializes in precedent-setting and socially-significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. TLPJ believes that arbitration, knowingly agreed to and fairly structured, can be a valuable mechanism for resolving appropriate legal disputes. In the past decade, however, an increasing number of corporations have attempted to cap their statutory and common law liability by forcing customers, employees, and vendors to participate in arbitration systems that are so unfair that most reasonable people simply will not pursue their claims. Three years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat such abuses. Through this project, our research has revealed that individuals are frequently deterred from pursuing claims in arbitration by the growing and prohibitive costs charged in many arbitration systems; indeed, in some cases, the arbitration fees exceed the amount of money in dispute. We submit this brief to bring these facts to this Court's attention—and to review their implications for this Court's analysis in this case.

SUMMARY OF ARGUMENT

Amici fully agree with petitioner that the Fourth Circuit's ruling impermissibly deprives the *EEOC* of its statutory power to investigate fully and seek relief for victims of disability discrimination under the ADA. We write separately to emphasize that the ruling below also impermissibly deprives *Mr. Baker* of his independent substantive statutory right to seek the cost-free assistance of the EEOC in obtaining make-whole relief under the ADA.

As a practical matter, the Fourth Circuit's ruling leaves workers like Mr. Baker with no remedy at all. The Waffle House arbitration agreement incorporates the procedures set forth in the Commercial Rules of the American Arbitration Association, which require claimants to pay a $2,000 filing fee just to initiate an arbitration, and to pay substantial ongoing daily forum and arbitrator fees. Waffle House's agreement also imposes an additional economic burden by requiring victims of

discrimination to pay for one-half of all arbitration costs, whether they eventually win or lose, notwithstanding the fee- and cost-shifting provisions of the ADA and other federal anti-discrimination laws. These provisions have an enormous chilling effect and erect an economic barrier that cannot be overcome by low-wage workers like Mr. Baker, whom Waffle House was paying a mere $5.50 per hour before it fired him—the equivalent of $11,000 per year before taxes and payment of basic living expenses.

We further write to respond briefly to the "assum[ption]" underlying the question presented to this Court—that the agreement between Waffle House and Mr. Baker in this case was "valid" and would have been judicially enforceable against Mr. Baker in a private action. *See* Petition for *Certiorari* at 10 n.2; Brief in Opposition at 8-9. While this assumption allows the Court directly to reach the question presented, it is wrong as a matter of both law and fact. The record in this case demonstrates that Mr. Baker neither knowingly nor voluntarily agreed to arbitrate any ADA or other statutory discrimination claims against Waffle House. The record further demonstrates that the mandatory arbitration procedures established by Waffle House's agreement were, in several respects, not adequate to protect his statutory rights. Consequently, although the Court may "assume" the validity of the private agreement between Waffle House and Mr. Baker in order to reach the question presented, it should make clear that no question concerning the validity of that agreement has been presented or is being addressed. The validity of the Waffle House agreement with Mr. Baker is, at a minimum, a matter of substantial controversy. Nothing in the Court's opinion should endorse, explicitly or implicitly, the enforceability of such an agreement in a private action.

ARGUMENT

AN EMPLOYER CANNOT FORCE ITS WORKERS TO WAIVE THEIR STATUTORY RIGHT TO SEEK COST-FREE REPRESENTATION BY THE EEOC IN PURSUING DISCRIMINATION CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT.

Eric Scott Baker was earning $5.50 per hour when respondent Waffle House fired him from his job as a hot grill operator, allegedly in violation of the Americans with Disabilities Act. C.A. App. 29. At $5.50 per hour, assuming Mr. Baker worked 40 hours per week for 50 weeks each year, his gross annual pre-tax salary would have been $11,000. For low-wage workers like Mr. Baker who have been the victims of employment discrimination, the statutory right to seek cost-free representation by the EEOC may be the only meaningful avenue for obtaining make-whole relief from an employer that has unlawfully discriminated. To construe Waffle House's mandatory arbitration agreement as waiving the statutory right to seek the EEOC's cost-free representation in pursuing make-whole relief would be to deny workers in Mr. Baker's circumstances the right to be free from unlawful discrimination.

1. The Americans with Disabilities Act Guarantees Disabled Americans the Right to Seek Cost-Free Representation By the EEOC When Their Anti-Discrimination Rights Have Been Violated.

The ADA guarantees workers not only the right to bring individual damages actions in federal or state court, but the independent right to file claims with the EEOC, thereby seeking the EEOC's *cost-free* assistance in investigating and prosecuting claims of workplace disability discrimination. *See* 42 U.S.C. §12117; 42

U.S.C. §2000(e)-5(f)(1).[2] This statutory right to cost-free federal assistance, established by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, is mirrored in the statutory schemes of most other federal and state anti-discrimination and worker protection statutes.[3] As Congress has concluded, the EEOC's active involvement in investigating and prosecuting claims of workplace discrimination is essential to accomplishing the statutory goals of protecting workers and deterring future violations of these critically important statutory anti-discrimination rights.[4]

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[2] The ADA, 42 U.S.C. §12117, incorporates the "powers, remedies, and procedures set forth in" several sections of Title VII. Among those sections is 42 U.S.C. §2000e-5(f)(1), which authorizes the EEOC to bring its own civil action against an employer that it believes has violated the Act. It also provides that if the EEOC chooses not to file a civil action in its own name but issues a right to sue letter, "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and *may authorize the commencement of the action without the payment of fees, costs, or security.*" (emphasis supplied).

[3] The EEOC provides these services pursuant to Title VII, 42 U.S.C. §§2000e-5(b), (e), (f), and the ADEA, 29 U.S.C. §626, as well as the ADA. The Department of Labor provides similar services pursuant to the FLSA. *See* 29 U.S.C. §216(c). The National Labor Relations Board's Office of General Counsel provides these services pursuant to the NLRA. *See* 29 U.S.C. §160(b), (e). Most state anti-discrimination statutes provide similar cost-free assistance by state administrative agencies as well. *See, e.g.*, Cal. Govt. Code §12960-76; S.C. Code Ann. Stats. §1-13-90(d).

[4] *See, e.g.*, 42 U.S.C. §12101(b) ("It is the purpose of this chapter – . . . (2) to provide clear, strong, consistent, enforce-

(continued...)

2. As Construed By the Fourth Circuit, Waffle House's Arbitration Agreement Impermissibly Forces Workers to Waive Their Substantive Statutory Right to Seek the EEOC's Assistance in Protecting Their Right to Be Free From Disability Discrimination and Forces Them to Pay Forum Costs That Undermine Congress' Efforts to Lower Economic Barriers for Victims of Discrimination.

This Court has repeatedly stated that mandatory, predispute arbitration agreements cannot be construed in a manner that will deprive employees of substantive statutory rights. Employment arbitration agreements encompassing statutory claims are enforceable only insofar as they merely shift the forum in which the protected party may seek full vindication of such rights. *See, e.g., Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 69 U.S.L.W. 4195, 4201 (2001), *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28 (1991), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-32, 637 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"); *Alexander v. Gardner-Denver*, 415 U.S. 36, 51, 56-58 (1974). The Waffle House agreement, as

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[4] (...continued)
able standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities); *see also General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980) (Congress gave the EEOC the "primary burden of litigation [and] . . . sought to . . . bring about more effective enforcement of private rights").

construed by the Fourth Circuit, does not merely shift the forum. It effects an impermissible waiver of its employees' substantive statutory protections by stripping them of their right under the ADA and other statutes to seek the cost-free assistance of the EEOC in obtaining make-whole relief.

Although Congress in the ADA and other anti-discrimination statutes guaranteed cost-free access to the EEOC, the Waffle House arbitration agreement is anything but cost-free. As a condition of applying for employment at the Waffle House restaurant in Columbus, South Carolina, Mr. Baker was required to agree to arbitrate any future employment-related claim "under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made" with "[t]he costs and expenses of the arbitration [to] be borne evenly by the parties." C.A. App. 26. At the time Waffle House filed its motion to compel arbitration (and continuing to the present), the AAA Commercial Arbitration Rules imposed substantial filing fees and other costs far beyond Mr. Baker's ability to pay, including: 1) a $2,000 filing fee that the claimant had to pay up front; 2) a $250 daily administrative fee to be split by the parties; and 3) hourly fees for the individual arbitrator (or arbitrators) to be split by the parties, which in even a single-arbitrator case could easily reach an additional $3,400 per day ($425 per hour × eight hours per day).[5]

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[5] *See* C.A. App. 54, 74-79; *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1062 & n.2 (11th Cir. 1998) (concurring opinion of Cox, Tjoflat, JJ.). Those fees are (continued...)

Merely to begin the arbitration process, then, Mr. Baker would have had to pay at least $2,000—the equivalent of 10 weeks' salary (in a job where he was fired after less than one month). By the end of a two-week arbitration, his total share of the AAA arbitration fees could have exceeded $20,000—the equivalent of almost two years' salary. No low-wage worker like Eric Baker can afford to pursue ADA rights in arbitration if forced to pay such high filing and forum fees.

As a practical reality, by forcing its workers to arbitrate all employment-related claims under the AAA Commercial Arbitration Rules, Waffle House has erected

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[5] (...continued)
now even *higher*. *See* http://www.adr.org/ (AAA Commercial Dispute Resolution Procedures, as amended September 1, 2000).

Although the applicable AAA Commercial Arbitration Rules provided a minimum filing fee of $500 for claims below $10,000 (with a sliding scale that could raise the threshold filing fee to as much as $11,000, C.A. App. 78), those Rules stated that "[w]hen no amount can be stated at the time of filing, the minimum fee is $2,000, subject to increase when the claim or counterclaim is disclosed." C.A. App. 78. Here, although the EEOC did not state a specific demand in its complaint (*see* C.A. App. 10-11), the combined request for back pay, front pay, compensatory, and punitive damages certainly was well in excess of $10,000.

The AAA Commercial Arbitration Rules also provided, and continue to provide, that in addition to the claimant being required to pay the filing fee up front (C.A. App. 74, 78), "[t]he AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case." C.A. App. 75.

an economic hurdle that precludes those workers from prosecuting their statutory anti-discrimination claims. The chilling effect of those high threshold fees on a worker's ability to vindicate statutory rights is enormous, particularly where as here, the employer, through the explicit terms of the arbitration agreement, has also overridden the statutory right to cost-shifting for prevailing plaintiffs. *See* 42 U.S.C. § 12205, 42 U.S.C. §2000e-5(k). By imposing its expensive arbitral regime on workers as a non-negotiable condition of their employment, Waffle House has effectively unilaterally opted out of the principal statutory enforcement mechanism created by Congress to deter employers from engaging in unlawful disability discrimination.

In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513 (2000), this Court addressed the potential impact of burdensome arbitration costs in considering "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." 121 S.Ct. at 517.[6] Because "the arbitration agreement was silent with respect to payment of filing fees, arbitrators' costs, and other arbitration expenses," and because the record "contain[ed] hardly any information" about whether plaintiff would bear such "large arbitration costs" plaintiff would be precluded, as a practical matter, from "effectively vindicating her federal statutory rights in the arbitral forum." Thus, this Court concluded that "[t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." 121 S.Ct. at 522.

[6] Although the New York Stock Exchange procedure at issue in *Gilmer* also required the payment of forum fees, this Court did not address the forum fee issue in its opinion, and this Court may have erroneously believed that the employer paid all filing and forum fees under the NYSE employment arbitration rules then in effect. *See Green Tree*, 121 S.Ct. at 524 (Ginsburg, J., dissenting) ("the 'who pays' question presented in this case did not arise in *Gilmer*. Under the rules that governed in *Gilmer*—those of the New York Stock Exchange—it was the standard practice for securities industry parties, arbitrating employment disputes, to pay all of the arbitrators' fees"); *see also Cole v. Burns Int'l Security Servs.*, 105 F.3d at 1483.

Here, by contrast, the record establishes that arbitration under AAA's Commercial Rules is inordinately expensive for an hourly-wage worker. Moreover, a claimant's economic burden is heightened by Waffle House's insistence that "[t]he costs and expenses of the arbitration shall be born evenly by the parties." C.A. App. 26. *Any* mandatory arbitration procedure that imposes forum fees and other costs on an ADA claimant deprives that claimant of the substantive statutory right to the cost-free assistance of the EEOC. An agreement containing such procedures cannot be enforced without violating the ADA and well-established state contract laws of general applicability that prohibit enforcement of unconscionable contracts and contracts that violate statute-based public policy. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). The congressionally-guaranteed right to seek the EEOC's assistance (and to cost- and fee-shifting) under the ADA is no less important than the statutory right to compensatory or punitive damages or to the full period of the statute of limitation. None of these substantive statutory rights can be the subject of a compulsory, pre-dispute waiver, mandated by the employer as a condition of the worker's employment or continued employment.

Many courts, both federal and state, have concluded that mandatory arbitration agreements imposing high forum fee costs are unenforceable. Either because they violate the underlying statute under which plaintiff seeks to vindicate rights or because, as a matter of state contract law of general applicability under Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, they violate public policy as reflected in those statutes. In *Cole v. Burns Int'l Security Services*, 105 F.3d at 1468 (emphasis added), for example, the D.C. Circuit held:

> In our view, *an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims under Title VII* (any more than an employee can be made to pay a judge's salary). If there is any risk that an arbitration agreement can be construed to require this result, this would surely deter the bringing of arbitration and constitute a *de facto* forfeiture of the employee's statutory rights.

See also 105 F.3d at 1484 ("We are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case"). Similarly, in *Armendariz v. Foundation Health PsychCare Services, Inc.*, 24 Cal.4th 83 (2000), the California Supreme Court held that mandatory employment arbitration agreements are unenforceable to the extent they require a statutory claimant to pay forum fees or other arbitral costs that exceed what would be required for a filing in court. 24 Cal.4th at 110-11; *accord, Shankle v. B-G Maintenance Management*, 163 F.3d 1230, 1233-35 (10th Cir. 1999); *Paladino, supra*, 134 F.3d at 1062.

The protection against high economic hurdles is critical to the effective functioning of the ADA and other anti-discrimination statutes. The ADA, like Title VII, serves important public policies of compensation and deterrence. The broad remedial provisions of these statutes are designed not only to make victims of discrimination whole, but to serve as a "spur or catalyst" to induce employers to "endeavor to eliminate, so far as possible, the last vestiges" of discrimination. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). As Congress has noted in the Title VII context, practices that "limit [a prevailing plaintiff's] recovery of attorneys' fees, other fees, and other costs of litigation under Title VII . . . frustrate the intent of Congress to protect the public interest by eliminating employment discrimination and to ensure that victims of such discrimination be made whole for the losses they have suffered." H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991) *reprinted in* 1991 U.S.C.C.A.N. 694, 723. These goals can only be achieved if the process for resolving statutory claims contains essential safeguards against the erection of economic barriers that will chill, rather than encourage, vindication of protected statutory rights.

3. The Waffle House Mandatory Pre-Dispute Arbitration Agreement Contains No Language Putting Prospective Workers on Notice That it Effects a Waiver of Their Statutory Right to Seek Make-Whole Relief From the EEOC

In framing the question presented, the Petition for Writ of *Certiorari* "assume[s]" that Mr. Baker entered into a "valid" arbitration agreement with Waffle House that precluded him from pursuing a private right of

action for disability discrimination in state or federal court.[7] Of course, even if that assumption were true, the mere fact that Waffle House had a "valid" arbitration agreement with Mr. Baker does not mean that its agreement should be broadly construed as waiving Mr. Baker's statutory right to seek the cost-free assistance of the EEOC in obtaining make-whole relief.

However, nothing in the language of the Waffle House arbitration agreement even purports to effect such a waiver. Thus, even if Waffle House lawfully *could* force its workers to waive their right to seek the cost-free assistance of the EEOC in prosecuting claims of discrimination—which it could not, for the reasons we explain—there is no evidence in this case that Mr. Baker knowingly agreed to such a waiver. There was no "meeting of the minds."

Waffle House's arbitration agreement is completely silent as to any limitation on the scope of the EEOC's prosecutorial or remedial authority. The four-sentence arbitration agreement (written in the tiniest of seven-point type, smaller than even the copyright information) merely states:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchise of

[7] *See* Petition for *Certiorari* at 10 n.2 ("we assume, for purposes of this petition, that Baker and Waffle House entered into a valid agreement to arbitrate employment-related disputes"); Respondents' Brief in Opposition at 8-9 ("In its Petition, the EEOC asks this Court to review the Fourth Circuit's decision only insofar as it relates to the limitation on the EEOC's ability to seek 'make-whole' relief in a judicial forum on behalf of Baker").

> Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be born evenly by the parties.

C.A. App. 26. This agreement was not adequate to put Mr. Baker on notice that by applying for employment with the Waffle House restaurant in Columbus, South Carolina, he would be precluding the EEOC from litigating any ADA claim for damages or other make-whole relief on his behalf. There is no reference to the EEOC in this arbitration language. Nor is there any explicit waiver of Mr. Baker's statutory right under the ADA (or any other statute) to cooperate with the EEOC or to benefit from any relief achieved by the EEOC—whether accomplished through litigation, arbitration or mediation. *See* C.A. App. 30. Applying well-established principles of contract construction, the Waffle House arbitration agreement therefore should not be construed as precluding the EEOC from seeking the full range of statutory remedies, including individual relief.[8]

[8] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (citations omitted) ("respondents cannot overcome the common-law rule of contract interpretation that

(continued...)

Even though *amici* are required to accept for purposes of briefing in this case that Waffle House could have enforced its arbitration agreement against Mr. Baker in a private civil action for damages, *see supra* at 13-14 & n. 7, we vigorously dispute the truth of that assumption, and contend that the Waffle House agreement would not be judicially enforceable against Mr. Baker in *any* proceeding. Because that issue of enforceability is not before the Court, however, instead of arguing the point at length, we merely request the Court to make explicit in its opinion, to avoid future confusion, that the EEOC did not challenge the validity of the Waffle House agreement or its enforceability against Mr. Baker, and that the Court's opinion should not be construed as endorsing that assumption.

There are at least three reasons why, in *amici*'s view, the assumption of validity is incorrect. First, as pointed out in the dissent by Judge King, under applicable South Carolina law no "contract" was formed between Mr. Bak-

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[8] (...continued)
a court should construe ambiguous language against the interest of the party that drafted it. . . . The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result"); Restatement (Second) of Contracts §206 (1979) ("In choosing among the reasonable meanings of . . . [an] agreement or a term thereof, that meaning is generally preferred which operates against the [drafting] party . . ."); *First Options v. Kaplan*, 514 U.S. 938, 947 (1995) (citations omitted) ("the basic objective [is] to ensure that . . . arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties"); *cf. Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79 (1998) (emphasis in original) ("what federal law requires . . . is not a question which should be *presumed* to be included within the arbitration requirement").

er and the Waffle House restaurant where he worked. Pet. at 23a-27a. Second, as further pointed out by Judge King, Waffle House's mandatory arbitration agreement unlawfully deprived Mr. Baker of specific statutorily-protected rights, and was thus invalid both as a violation of the substantive statute and under state contract principles of general application. Pet. at 26a-27a n.16. Third, mandatory pre-dispute arbitration agreements imposed as a non-negotiable condition of employment do not contain the essential element of "voluntariness" that Congress required under Title VII and the ADA and that make arbitration agreements a matter of "consent, not coercion." *See, e.g., Mastrobuono, supra*, 514 U.S. at 57, *quoting Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989); *see* EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, No. 915002 (July 10, 1997); National Academy of Arbitrators' Statement and Guidelines, 103 Daily Labor Rep. (BNA) E-1 (May 29, 1997); Commission on the Future of Worker-Management Relations Report an Recommendations, 1994 Daily Labor Rep. (BNA) 105 (June 3, 1994).[9]

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[9] The ADA provides that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration is encouraged." 42 U.S.C. §12212. The legislative history explains that this provision clarified Congress' intent that employers should not be permitted to force workers to forfeit the statute's guaranteed access to a court and a jury trial. *See, e.g.*, H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3 at 76-77 (1990) ("The Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement

(continued...)

[9] (...continued)
provisions of this Act"); H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990) ("It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition could an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA"). When Congress incorporated this same language into Title VII the following year, *see* P.L. 102-166 §118, 105 Stat. 1071 (1991) codified as a historical and statutory note to 42 U.S.C. §1981, Congress again clarified that the "proviso is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available." 137 Cong. Rec. H9505-01, H9530 (Nov. 7, 1991).

The degree of "voluntariness" needed to render a mandatory arbitration agreement enforceable has never been squarely addressed by this Court in any case, let alone in a case under the ADA. In *Gilmer*, 500 U.S. at 33, for example, a case arising under the ADEA, the Court avoided the voluntariness issue by noting that although Mr. Gilmer, as a securities industry broker, was required to sign a Form U-4 Registration Form and thereby to register with a national securities exchange, there was "no indication that Gilmer . . . was coerced . . . into agreeing to the arbitration clause in his registration application." In *Wright*, 525 U.S. at 82 n.2, which was an ADA case, the Court explicitly reserved the voluntariness question, stating: "Our conclusion that a union waiver of employee rights to a federal judicial forum for employment-discrimination claims must be clear and unmistakable means that, absent a clear waiver, it is not 'appropriate,' within the meaning of this provision of the ADA, to find an agreement to arbitrate. We take no position, however, on the effect of this provision in cases where a CBA clearly encompasses employment-discrimination claims, or in areas outside collective bargaining."

4. If a Victim of Discrimination Had the Same Rights in Arbitration as in Court, an Employer Would Have No Incentive to Require the Victim's Discrimination Claim to be Split Between an Arbitration Forum and a Judicial Forum

The Fourth Circuit's analysis rests upon the unstated assumption that Waffle House's mandatory arbitration program provides a fair, alternative forum for vindication of Mr. Baker's statutory anti-discrimination rights that is equivalent in all material respects to the judicial forum. Logically, however, if that "separate but equal" forum assumption were true, Waffle House would have had no incentive to urge any limitation on the EEOC's authority to pursue relief in this case.

It is neither efficient nor economical to litigate a single claim in two different forums. The *only* practical reason why Waffle House could be insisting that the remedial issues be divided between a judicial and an arbitral forum is because those two forums are *not* truly equal—either because the worker will get less relief from an arbitrator than a court, or because the worker cannot afford to, or is otherwise chilled from, individually pursuing his rights in the arbitration forum at all. And that is, indeed, what the studies show to be true.[10]

[10] As the California Supreme Court recently concluded in *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal.4th 83 (2000):

> [I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse

(continued...)

Waffle House does not dispute that the EEOC is already in court, seeking injunctive and other prospective relief on behalf of Mr. Baker or any other worker found to be the victim of discrimination. Because the underlying facts of his case are *already* being presented to the district court, requiring Mr. Baker's individual damages claims to be pursued in an arbitration rather than by the EEOC, in its already-ongoing litigation, could only *increase* Waffle House's costs, by forcing it to adjudicate overlapping issues in two separate forums. Only if those forums are not equivalent could Waffle House benefit from the position it asserts in this Court.

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[10] (...continued)
a job because of an arbitration requirement. While arbitration may have its advantages in terms of greater expedition, informality, and lower cost, it also has, from the employee's point of view, potential disadvantages: waiver of a right to a jury trial, limited discovery, and limited judicial review. *Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a "repeat player" in the arbitration system.* (Bingham, *Employment Arbitration: The Repeat Player Effect* (1997) 1 Employee Rts. & Employment Policy J. 189; Schwartz, [*Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33,]60-61.) It is perhaps for this reason that it is almost invariably the employer who seeks to compel arbitration. (See Schwartz, *supra*, 1997 Wis. L. Rev. at pp. 60-63.)

Id. at 115 (emphasis supplied).

CONCLUSION

For the reasons stated, the judgment of the Fourth Circuit should be reversed.

May 25, 2001

Respectfully submitted,

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In the
Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner
v.
WAFFLE HOUSE, INCORPORATED,
Respondent

On Writ of *Certiorari* to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIÆ* ASSOCIATED INDUSTRIES OF MASSACHUSETTS, CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission ("EEOC") is precluded from seeking employee-specific relief when the employee has entered into an enforceable agreement to arbitrate employment disputes with his employer?

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INTEREST OF *AMICI CURIÆ*

Associated Industries of Massachusetts ("A.I.M.") is the largest nonprofit, nonpartisan association of Massachusetts employers with approximately 5,900 members. A.I.M.'s mission is to promote the well-being of its members and their employees and the prosperity of Massachusetts by improving the economic climate of Massachusetts, proactively advocating fair and equitable public policy, and providing relevant, reliable information and excellent services.

The Connecticut Business and Industry Association ("CBIA") is an association of Connecticut businesses whose more than 10,000 member companies together employ more than 700,000 people across the state. CBIA offers its members an array of resources and services related to the legal, economic and social aspects of running a business and it presents its members' views on public policy and legal issues to legislative, regulatory and judicial authorities.

The New England Legal Foundation ("NELF") is a non-profit, public interest law firm incorporated in 1977.[1] Its membership consists of individuals, businesses, and

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that counsel for neither Petitioner nor Respondent authored the accompanying brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. The contents of both parties have been filed with the Clerk of the Court.

others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. See, e.g., Palazzolo v. Rhode Island, 69 U.S.L.W. 4605 (U.S. June 28, 2001); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000); UNUM Life Ins. Co. v. Ward, 526 U.S. 358 (1999); BMW v. Gore, 517 U.S. 559 (1996); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000); Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997).

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the importance of the enforcement of agreements to arbitrate employment disputes and role of the EEOC when an enforceable agreement to arbitrate is in place. *Amici* believe that this brief may provide an additional perspective which may aid the Court in determining whether an employee's enforceable agreement to arbitrate employment disputes precludes the EEOC from seeking employee-specific relief in federal court.

STATEMENT OF THE CASE

Amici adopts the Statement of the Case contained in the Brief of the Respondent Waffle House, Incorporated ("Waffle House").

SUMMARY OF ARGUMENT

This Court has in prior cases rejected the notion that arbitration is inherently incapable of enforcing employees' rights to be free of unlawful discrimination in the workplace. Enforcing mandatory predispute arbitration agreements will not, contrary to the arguments of the EEOC and its *amici*, undermine the enforcement of federal employment discrimination laws nor immunize particular employers from EEOC scrutiny. Under the Fourth Circuit's decision, the EEOC remains free to seek injunctive relief against a discriminating employer to vindicate the public interest and, when necessary, obtain clarification of the law for both employers and employees.

Nor will enforcement of mandatory predispute arbitration agreements impermissibly interfere with the discretion that Congress has given the EEOC to enforce federal employment discrimination laws. Unlike the broad discretion that Congress delegated to the National Labor Relations Board ("NLRB") to prevent and remedy unfair labor practices, the EEOC has not been given direct enforcement powers. The federal courts, not the EEOC, determine the appropriate remedy in an action by the EEOC.

Employees do not have a substantive right to cost-free representation by the EEOC in federal court as the EEOC's *amici* contend. It is the EEOC, not employees, which chooses which cases it litigates in court. Employees have not been given any right to require the EEOC to bring suit on their behalf.

Contrary to the arguments made *amici* the States of Missouri et al., arbitration of employment disputes provides an effective and efficient alternative to litigation for employees and employers alike.

ARGUMENT

I. THIS COURT HAS ALREADY REJECTED THE EEOC'S ARGUMENT THAT ARBITRATION AGREEMENTS IMPROPERLY UNDERMINE THE EEOC'S ENFORCEMENT OF FEDERAL EMPLOYMENT DISCRIMINATION LAWS.

This Court has held that the Federal Arbitration Act, 9 U.S.C. § 1 ("FAA"), sets out a liberal federal policy favoring arbitration to resolve disputes. The purpose of the FAA is to "place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). This Court has endorsed this policy favoring arbitration, including agreements to arbitrate "claims arising under a statute designed to further important social policies." Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 521 (2000). See Gilmer, 500 U. S. at 24. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. at 28. Indeed, this Court recently reiterated its support for arbitration, stating:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. . . . Arbitration agreements

> allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1313 (2001) (citation omitted). See also Green Tree Financial, 121 S. Ct. at 521 ("We have likewise rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be claimants.'")

Notwithstanding these decisions, the EEOC and its *amici* argue that precluding the EEOC from pursuing employee-specific relief when an employee has entered into an enforceable arbitration agreement will have a devastating impact on the EEOC's enforcement of federal anti-discrimination statutes. See EEOC Brief at 33; Brief of *Amici Curiae* Maryland Commission on Human Relations et al. at 24-28. This Court, however, in Gilmer rejected the argument that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., precluded arbitration because it "is designed not only to address individual grievances, but also to further important social policies." Gilmer, 500 U.S. at 27. This Court did "not perceive any inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." Id. This Court also rejected the argument that permitting arbitration of ADEA claims would "undermine the role of the EEOC in enforcing the ADEA," id. at 28, reasoning:

> An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination. . . . Moreover, nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement. . . . Finally, the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.

Id. (citations omitted).

Neither the EEOC nor any of its *amici* explain why this Court should reach a different result under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq. Since there is no significant difference between the EEOC's enforcement authority under the ADEA and the ADA, this Court should follow Gilmer. To rule otherwise will

> permit an individual, who has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages

on his or her behalf [and] would undermine the *Gilmer* decision and the FAA.

EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 303 (2d Cir. 1998).

Moreover, enforcing arbitration agreements will not, as the EEOC argues, "immunize" employers with company-wide mandatory arbitration agreements from EEOC enforcement efforts. See EEOC Brief at 33. Under the Fourth Circuit's decision, the EEOC remains free to investigate and conciliate employee charges of unlawful discrimination in the first instance. Should that effort fail, as it apparently did in this case, the EEOC may seek injunctive relief with its attendant potential for negative publicity for the accused employer. See Julie L. Waters, *Does the Battle Over Mandatory Arbitration Jeopardize the EEOC's War in Fighting Workplace Discrimination?* 44 St. Louis U. L. J. 1155, 1186-87 (2000) ("By allowing the EEOC to seek [injunctive] relief on behalf of the public interest, an employer's discriminating behavior is exposed to the public through the court process."). Accordingly, while Baker's agreement to arbitrate has removed one arrow from the EEOC's quiver, it has not rendered the EEOC powerless to act in the public interest to highlight and remedy unlawful employment discrimination.

Equally unavailing is the EEOC's argument that enforcing an employee's agreement to arbitrate thwarts its ability "to obtain clarification of the law to guide employers and employees alike." EEOC Brief at 36. With the EEOC free to pursue injunctive relief against employers who engage in unlawful discrimination, even

when their employees have entered into arbitration agreements, the EEOC retains its ability "to obtain clarification of the law." Here, Baker's agreement to arbitrate has not thwarted the EEOC's ability to guide Waffle House's conduct if that conduct is shown to have violated the ADA.

Further, the EEOC itself chooses those few cases it actually litigates. See EEOC Brief at26. If, in the EEOC's judgment, an injunction against a discriminating employer will not sufficiently advance the public interest so as to justify its expenditure of resources, the EEOC may decide not to litigate such a case and choose instead to litigate a similar case where it may properly pursue employee-specific relief. Given the sheer number of charges filed yearly with the EEOC, it is unlikely that only a single case in which the employee has agreed to arbitration will involve a novel discriminatory employment practice that needs to be clarified.[2] Yet, even if the practice arose only in one case, the EEOC has other tools at its disposal to educate employers and employees. For example, it may issue guidelines or policy statements to clarify that particular practices are, in its view, unlawful. Accordingly, the occasional presence of an arbitration agreement in a case in which the EEOC would prefer to seek employee-specific remedies, but is precluded from doing so, will not seriously affect the

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2. "The vast majority of individual cases do not raise complex issues of law, but rather call for appliction of established law to facts." Kathleen M. Kelly, *Introduction to the 1997 McGeorge Symposium on Contractual Arbitration*, 29 Mc George L. Rev. 177, 194 (1998).

EEOC's enforcement of federal law.

II. THE EEOC DOES NOT ENJOY THE BROAD DISCRETION THAT THE NLRB DOES TO IMPOSE REMEDIES ON THOSE VIOLATING EMPLOYMENT DISCRIMINATION LAWS.

Amicus National Whistleblower Center argues that the FAA "does not displace the EEOC's administrative authority to determine the appropriate remedy necessary to effectuate federal policy in a discrimination case." National Whistleblower Center Brief *Amicus Curiae* ("Center's Brief") at 4 (heading I). It relies heavily upon Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), for the proposition that "Congress vested the EEOC with the discretion to determine the relationship between the remedy sought in an action filed by the Commission, and the Commission's obligation to advance the broader public interest." Center's Brief at 6. The Center's reliance on Phelps Dodge is misplaced and ignores the different roles Congress assigned to the NLRB and the EEOC.

The NLRB is authorized to "prevent any person from engaging in any unfair labor practice." 29 U.S.C. § 160 (a).

> Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described

> unfair conduct in order to remove obstructions to interstate commerce.

Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 265 (1940). The NLRB has been given broad discretion to maintain and promote "industrial peace." Phelps Dodge, 313 U.S. at 194.

> A statute expressive of such large public policy as that on which the [NLRB] is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

Id. It was in the context of the broad discretion Congress delegated to the NLRB to craft remedies to prevent and remedy unfair labor practices that this Court noted that "courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of the law into the more spacious domain of policy." Id.

Congress has not given the EEOC similar authority to prevent or to provide remedies for employment discrimination. "Title VII does not provide the Commission with direct power of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Rather, the EEOC 's role is limited to the investigation and informal resolution of charges of employment discrimination. 42 U.S.C. § 2000e-5(b). If these efforts are unsuccessful, the EEOC may chose to bring an enforcement action in court. 42 U.S.C. § 2000e-4 (f) (1). It is the courts, however, not the EEOC, that have plenary power to enforce federal employment discrimination laws. 42 U.S.C. § 2000e-5 (g). The ADA, like Title VII, "authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effect of unlawful employment practices. . . . [F]ederal courts have been assigned plenary powers to secure compliance with Title VII." Alexander, 415 U.S. at 45. The courts determine the appropriate remedy, not the EEOC. Accordingly, precluding the EEOC from pursuing employee-specific relief when an employee has entered into an enforceable arbitration agreement does not impermissibly interfere with the discretion Congress granted the EEOC in the enforcement of federal employment discrimination laws.

III. THE CLAIMED "RIGHT" TO FREE REPRESENTATION BY THE EEOC IS AN ILLUSORY RIGHT AT BEST.

The Lawyers' Committee for Civil Rights Under Law argues in its Brief *Amicus Curiae* that Baker's agreement to arbitrate should not be enforced because it amounts to

"a prospective waiver of substantive protections, including the opportunity to obtain relief through an action initiated pursuant to the independent enforcement authority of the EEOC." Brief *Amicus Curiae* Lawyers' Committee for Civil Rights Under Law et al. at 19. In a similar argument, the National Employment Lawyers Association contends that the arbitration agreement at issue here "effects an impermissible waiver of [Waffle House's] employees statutory protections by stripping them of their right under the ADA . . . to seek cost-free assistance of the EEOC in obtaining make-whole relief." Brief *Amicus Curiae* National Employment Lawyers Association et al. at 8. This claimed "right" is not a right that employees have at all.

As the EEOC notes, it picks the few cases it will pursue in court. EEOC Brief at 26. Employees, like Baker, cannot require the EEOC to pursue claims on their behalf and the likelihood of the EEOC bringing an enforcement action on behalf of any individual employee is exceedingly low. According to the EEOC, it filed 439 suits in 1999 and 291 in 2000. EEOC Brief at 26 n.9. The rate at which the EEOC brought suit on behalf of employees who had obtained findings of reasonable cause and had unsuccessful conciliations in 1999 was approximately 9% and in 2000 was less than 5%.[3] The

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3. According to EEOC statistics, the EEOC resolved 97,846 charges in 1999. Of these, 4,837 were unsuccessful conciliations which becme candidates for litigation. hhtp://www.eeoc.gov/stats/all.html. Similarly, the EEOC resolved 93,672 charges in 2000 resulting in 6,208 unsuccessful conciliations. Id.

remote possibility that the EEOC might pursue a claim seeking employee-specific relief does not transform the EEOC's discretion to bring suit into a substantive right that Congress conferred on employees to cost-free EEOC representation.

IV. ARBITRATION RESOLVES EMPLOYMENT DISCRIMINATION CLAIMS MORE EFFECTIVELY AND EFFICIENTLY THAN LITIGATION.

Undeterred by this Court's rejection of "generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be claimants," Green Tree Financial, 121 S. Ct. at 521, the States of Missouri et al. argue that

> the reality is that pre-dispute employment arbitration agreements are often treated with a healthy dose of skepticism.

Brief *Amicus Curiae* of States of Missouri et al. ("States' Brief") at 9. The States' Brief notes that "some legal scholars oppose such mandatory arbitration" and that some states have exempted "employer-employee pre-dispute arbitration agreements from enforcement." Id.[4] The States further contend that the skepticism they report

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4. It is doubtful that such state laws are valid. See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 467, 478 (1989); Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

"is based, in part, on the apparent limitations of the arbitration forum," id., including alleged lack of arbitrator expertise, the possibility that a given arbitrator might ignore the substantive law, and alleged arbitrator bias in favor of employers. Id.at 10-11. These contentions ignore both the evolution in employment arbitration and the results of more recent data on arbitration and litigation outcomes.[5]

Since this Court's decision in Gilmer and the ensuing debate over the wisdom of that decision, many changes have taken place in employment arbitration. See, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 Ruters L.J. 399 (2000); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Claims*, 72 N.Y.U. L. Rev. 1344 (1997). For example, in 1995, an American Bar Association task force, which included members of the American Civil Liberties Union and the National Employment Lawyers Association, "issued a unanimous protocol on arbitral due process." Matlby, supra, 30 Colum. Hum. Rts. L. Rev. at 39. This

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5. The States assert that 70% of employee-plaintiffs are successful in court. States' Brief at 9. They cite Evan J. Spelfogel, *Mandatory Arbitration vs. Employment Litigation*, 54 Disp. Resol. J. 78, 78 (May 1999) for this statistic. While the Spelfogel article does contain this assertion, it cites to no source whatsoever for support. It should be noted that this phenomenal success rate for employees in court is not supported by other studies. See page 16 infra.

protocol has been adopted by the American Arbitration Association ("AAA") and JAMS/Endispute, "by far the largest providers of arbitration services." Id. The protocol includes:

> (a) a neutral and unbiased arbitrator; (b) right of the employee to an equal role in selecting the arbitrator; (c) right to counsel; (d) right to reasonable discovery; (e) identical remedies to those available in court; and (f) a written opinion.

Id. In addition, the protocol " requires that the roster of available arbitrators 'must be established on a non-discriminatory basis, diverse by gender, ethnicity, background and experience.'" Id. at 40 (citation omitted). In response, the AAA "created a new roster of available arbitrators. . . . Only those candidates who were considered fair and impartial by all parties were included on the roster." Id. "It is hard to imagine that the present roster of the federal judiciary . . .would survive this process." Id. Thus, fears that arbitrators lack expertise or are biased in favor of employers are not well-founded.[6]

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6. The AAA's *National Rules for Resolution of Employment Disputes, Arbitration and Mediation Rules*, effective June 1, 1997, require that arbitrators "be experienced in the field of employment law" and require that prospective arbitrators "disclose all information that might be relevant to the standards of neutrality set forth in this Section, including . . . services as a neutral in any past or pending case involving any of the parties." Rule 11 a (i), b, *reprinted in* 2 Labor & Employment Arbitration Appendix 3 (Tim Bornstein et al. eds. 2001).

Indeed, studies show that employees fare better in arbitration than they do in litigation.

> Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court. For example, an AAA survey of employment arbitration results from 1993-95 shows that employees who arbitrated their claims won sixty-three percent of the time. In comparison, according to federal district court records for 1994, only 14.9% of the employees who took their claims to court won their cases.

Maltby, supra, 30 Colum. Hum. Rts. L. Rev. at 47. See also Green, supra, 31 Rutgers L.J. at 453-54; Claudia MacLachlan, *Employers Winning ADA Suits*, 22 Nat'l L. J. B1, B3 (July 31, 2000) (American Bar Association study determined that between 1992 and 1997, employers prevailed in 91.6% of ADA cases filed in federal court). Moreover, several commentators have observed that arbitration may be the only realistic avenue for recovery for most employees. "[C]ivil litigation resulting in substantial jury awards is a realisitic prospect for relatively few claimants." Estreicher, supra, 72 N.Y.U. L. Rev. at 1356. As Professor Estreicher explains:

> For the vast majority, a private lawyer cannot be secured and their claims will be addressed, if at all, by overworked, understaffed administrative agencies.

Id. at 1356-57. Accordingly, "arbitration holds the

potential to make workplace justice truly available to the rank-and-file for the first time in our history." Maltby, supra, 30 Colum. Hum. Rts. L. Rev. at 63.

In fact, employees apparently are satisfied by and large with the results they receive in arbitration.

> A survey of employee attitudes with respect to the use of arbitration in employment disputes shows that 83% of American workers favor the use of arbitration instead of courts to settle disputes with management. . . . Most employees surveyed felt that arbitration would make it easier for ordinary workers to obtain a speedy and fair hearing, that it would be far less costly than hiring a lawyer and going to court, and that it was a meaningful substitute under federal civil rights laws.

Spelfogel, supra, 54 Disp. Resol. J. at 81. Thus, despite the EEOC's unwavering opposition to the enforcement of predispute arbitration agreements, both employers and employees benefit from the less expensive and faster resolution of employment disputes such agreements afford.

While the debate over the wisdom of mandatory predispute agreements to arbitrate employment disputes will no doubt continue, that public policy question is for Congress, not the courts, to resolve. And, to date, "Congress has repeatedly rejected legislation that would explicitly bar mandatory agreements to arbitrate employment discrimination claims." Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 10 (1st Cir.

1999) (citing bills introduced in Congress). Unless and until Congress prohibits such agreements, this Court should follow its decision in Gilmer and require all employees who enter into such agreements to adhere to their promises while permitting the EEOC to seek injunctive relief, if warranted, against their employers.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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No. 99-1823

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF COUNCIL FOR EMPLOYMENT LAW EQUITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an employee's agreement to arbitrate employment-related disputes with an employer limits the scope of employee-specific remedies that the Equal Employment Opportunity Commission may recover on behalf of the employee through litigation under 42 U.S.C. §§ 2000e-5(f)(1) and (g)(1), 42 U.S.C. §§ 1981a(a)(1) and (d), and 9 U.S.C. §§ 1 et seq.

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IN THE

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF COUNCIL FOR EMPLOYMENT LAW EQUITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the Council for Employment Law Equity as *amicus curiae* in support of respondent, with the written consent of the parties.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the COUNCIL FOR Employment Law Equity, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

INTEREST OF AMICI

The Council for Employment Law Equity ("CELE") is a non-profit national coalition of major employers, based in Washington, D.C., which is committed to the highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large. The CELE represents a wide range of employers from all parts of the country and many sectors of the economy. The CELE routinely submits *amicus curiae* briefs to the U.S. Supreme Court and to other federal and state courts on employment issues of broad interest to the employer community at large. In addition, the CELE frequently submits comments to federal agencies during rule-making on proposed labor and employment regulations. The CELE also serves as a spokesperson for the employer community on major labor and employment issues.

CELE, its members, and the employer community generally are troubled by the position the Equal Employment Opportunity Commission has taken in this, and earlier, cases with respect to the general enforceability of pre-dispute arbitration agreements in the employment context. Desiring to provide a better internal system for resolving employment disputes – in keeping with this Court's essential approach to sexual and other harassment claims in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "Congress' intention to promote conciliation rather than litigation in the Title VII context"), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) – a number of significant U.S. employers have entered into arbitration agreements with their employees that, we believe, do a better job of delivering accessible justice and a meaningful forum for workplace disputes than does a court-based litigation system. These agreements often provide for an internal grievance and

mediation process and, if the dispute cannot be resolved therein, send the dispute to binding arbitration before an arbitrator who is expressly empowered to award all statutory remedies for established violations. Some agreements also provide for a company-financed benefit plan that reimburses employee-claimants for their attorney's fees.[2]

The EEOC has determined that pre-dispute arbitration agreements, irrespective of how they are structured, violate the policy of the federal anti-discrimination laws, despite the contrary holding of this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See* EEOC Policy Statement on Mandatory Arbitration, reprinted in Daily Lab. Rep. (BNA), No. 133, E-1 ff. (July 11, 1997). Given the Commission's view of *Gilmer* and of arbitration generally, the employer community reasonably fears that what the Commission is seeking in this case is the authority to enable employees and former employees to bypass, for all practical purposes, the arbitration agreements they have entered, by the device of suing in the agency's name. The effect of such a ruling will be to undermine the viability of arbitration agreements for employment disputes, effectively rendering a dead letter this Court's decisions in *Gilmer* and *Circuit City Stores v. Adams*, __U.S.__, 121 S. Ct. 1302 (2000).

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[2] *See, e.g.*, William L. Bedman, *Alternative Dispute Resolution: The Brown & Root Experience*, PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR 123-35 (S. Estreicher ed., 1997); Eric A. Taussig, *Predispute Arbitration Agreements: The Philip Morris Program*, *id.* at 137-46. *See generally* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO STATE J. ON DISPUTE RESOL. 559 (2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

The position of the Equal Employment Opportunity Commission ("EEOC" or "Commission") and its *amici* in this case is, for the most part, a red herring. They complain that the Fourth Circuit's decision allows an individual complaining employee to bargain away the EEOC's right to sue and its choice of forum. *See* Brief of the Petitioner ("EEOC Br.") 22, 23. Contrary to that characterization, the Fourth Circuit explicitly held that "arbitration agreements between charging parties and their employers [do] not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws in court." *EEOC v. Waffle House*, 193 F.3d 805, 811-12 (4th Cir. 1999). Nothing in the court of appeals' ruling prevents the EEOC from "bring[ing] a civil action against any respondent," 42 U.S.C. § 2000e-5(f)(1); nothing prevents it from bringing such a suit on behalf of an individual employee who has signed an arbitration agreement; and nothing prevents it from bringing the action in a forum of its choice. The ruling below expressly acknowledges that the agency retains untrammeled authority to bring an action for injunctive relief. *See Waffle House*, 193 F.3d at 812. And the Fourth Circuit's holding in no way impacts the EEOC's ability in appropriate circumstances to challenge the validity of particular arbitration agreements under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq., or this Court's guidance in *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001).[3]

[3] Nor, of course, does the ruling of the court below prevent the agency from bringing an action for any legally authorized relief on behalf of individual employees who have not signed arbitration agreements enforceable under the FAA or cognate state law.

The only issue in this case is whether, when the EEOC brings a Section 706(f)(1) action on behalf of an employee (or former employee) who has signed a valid and enforceable arbitration agreement,[4] the agency may secure *individual-specific* relief for that employee as if he or she had never agreed to arbitration. Our position is that the agency may not secure such individual-specific relief because the scope of relief that the employee (or the EEOC on her behalf) may obtain is always a function of, and hence limited by, the employee's circumstances or actions. The employee's voluntary entry into an arbitration agreement is no exception. Numerous Title VII precedents make clear that the remedies that the EEOC may obtain on behalf of an employee may be limited by any number of unilateral actions that employee takes, such as her failure to mitigate her damages, her attainment of a comparable position with a different employer, or her waiver, settlement or adjudication of her claims. The EEOC offers no reason why the same principle should not apply to arbitration agreements. Just as the EEOC may not obtain back pay or front pay an employee who is ineligible for such relief because she failed to mitigate or she entered into a private settlement of her claims, the EEOC also cannot in a judicial forum obtain back pay, front pay, reinstatement, or other individual-specific remedies for an employee who is ineligible for such judicial relief due to her agreement to submit her claims to an arbitral forum.

The government, however, makes the quite remarkable argument that Title VII "grants the EEOC the right to obtain *all* statutory remedies in any action that it brings." EEOC Br. 18 (emphasis added). According to the EEOC, Title VII "in clear terms authorizes the EEOC to obtain *all* of the

[4] The EEOC agrees that the question of whether the arbitration agreement here is enforceable as between Eric Baker and Waffle House is not before this Court. *See* EEOC Br. 17 n.4.

listed forms of relief," *id.* at 19 (emphasis added), both those listed in Section 706(g) and in the 1991 amendments to the Civil Rights Act. *See id.* at 19, 17.

The provenance of the EEOC's reading of the statute is somewhat difficult to discern. There is no basis in Title VII for maintaining that the EEOC has the right "to obtain all statutory remedies in any action that it brings." When it sues under Section 706(f)(1), the agency may obtain *only* the relief that is legally authorized by the remedial provisions of Title VII – primarily Section 706(g) – which apply equally to claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. Under Section 706(g), in turn, it is the court that decides whether to "enjoin the respondent . . . , and order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief *as the court deems appropriate*." 42 U.S.C. § 2000e-5(g)(1) (emphasis added). When Congress amended Title VII and the ADA in 1991, it did not change Section 706(g)'s basic scheme, under which the court – not the EEOC – determines whether the sought-after relief is appropriate. The 1991 amendments simply state that a "complaining party" (defined to include the EEOC) "*may recover*" capped compensatory and punitive damages in addition to the remedies already authorized by Section 706. 42 U.S.C. § 1981a(a)(1)-(2) (emphasis added); *see id.* §§ 1981a(b)(1) & (d)(1)(B). The entitlement to relief of any kind depends on whether the relief in question is legally authorized under the circumstances of the particular case.

Thus, a straightforward reading of Title VII shows that although the EEOC has a statutory right to bring a civil action, the agency has no absolute statutory entitlement to obtain particular remedies. In the case of employee-specific remedies, the EEOC may only obtain those remedies that are deemed "appropriate" based on the employee's individual

circumstances and actions. In other words, under Title VII, the EEOC may choose to bring a civil action on behalf of any employee, but may obtain only that relief for which the employee is eligible. With regard to employee-specific remedies, the EEOC must take its employee as it finds him.

The government's interpretation of Title VII is also at odds with the Federal Arbitration Act ("FAA") and this Court's FAA jurisprudence. The FAA evinces a strong policy in favor of enforcing arbitration agreements. Refusing to hold employees to their agreement to arbitrate by allowing the EEOC to obtain employee-specific remedies on their behalf would, in effect, release an employee from his binding agreement to arbitrate, and would gravely undermine the purposes of the FAA. This Court has held that such an intent to override the FAA will only be found if Congress makes a clear statement to that effect in its legislation. However, in Title VII and the 1991 amendments, Congress did not provide that the purposes of the FAA should be subordinated to the purposes of the anti-discrimination statutes. Indeed, there is express provision to the contrary in the 1991 measure. Accordingly, when an employee has entered into a valid binding arbitration agreement with her employer, employee-specific remedies are not "appropriate" relief in an EEOC-initiated action on that employee's behalf.

ARGUMENT

I. TITLE VII AUTHORIZES THE COURTS – NOT THE EEOC – TO DETERMINE WHAT RELIEF IS APPROPRIATE IN A TITLE VII ACTION.

The government contends that Title VII "embodies a congressional policy that there can be a strong public interest in obtaining each of the forms of relief authorized by statute and a congressional delegation to the EEOC – not the courts – of the authority to decide when the public interest warrants bringing a public enforcement action to obtain that relief." EEOC Br. 29. *Amicus curiae* does not contest that

Section 706(f) gives the EEOC authority to bring an enforcement action on behalf of an employee – even if that employee is bound by an arbitration agreement – whenever the EEOC believes that such an action is warranted. However, we disagree strongly with the suggestion that the EEOC is authorized to determine what forms of relief are appropriate in a particular lawsuit. *See, e.g.*, EEOC Br. 19 (Title VII "in clear terms authorizes the EEOC to obtain *all* of the listed forms of relief") (emphasis added); *id.* at 19 (Congress appointed the EEOC with "*complete control*" over the relief that it is entitled to seek) (emphasis added); *id.* at 18 (Title VII "grants the EEOC the right to obtain *all* statutory remedies in any action that it brings") (emphasis added).

Like any litigant, the EEOC may in any judicial action *seek* a wide range of potential remedies, subject to the limitations of Rule 11 of the Federal Rules of Civil Procedure and futility. Under the remedial provisions of Title VII, however, Congress has unambiguously authorized the courts – not the EEOC – to determine which remedies constitute "appropriate" relief in an EEOC action against a private employer. Whereas Section 706(f), which defines the powers of the EEOC, clearly speaks of the EEOC's authority to bring a civil action when conciliation efforts fail, Section 706(g) – the basic remedial provision of Title VII – refers only to the power of the *courts*. Section 706(g)(1) states that, if the court finds intentional discrimination in such an action, "the *court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief *as the court deems appropriate*." 42 U.S.C.

§ 2000e-5(g)(1) (emphasis added).[5] Thus, notwithstanding the EEOC's suggestion that Congress appointed it with "complete control" over the relief that it is entitled to seek, the plain text of Title VII makes it quite clear that it is the courts – not the Commission – that must interpret the meaning of "appropriate" relief under Title VII, both in general terms and in any particular case. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-16 (1975) ("The [Title VII] scheme implicitly recognizes that there may be cases calling for one remedy but not another, and – owing to the structure of the federal judiciary – these choices are, of course, left in the first instance to the district courts [and then subjected to appellate review].").[6] Far from robbing the

[5] The 1991 amendments to the Civil Rights Act added new remedies to supplement those already available under Title VII, providing that a "complaining party" – including the EEOC – "*may* recover" compensatory and punitive damages in addition to the remedies already authorized by Section 706(g). *See* 42 U.S.C. § 1981a(b)(1) (emphasis added); *see also id.* §§ 1981a(a)(1)-(2), (d)(1)(B). But nothing in Section 1981A changes Section 706(g)'s baseline proposition that it is the court – not the EEOC – that is authorized to award relief as it "deems appropriate."

[6] By way of contrast, Section 717(b), which unlike the rest of Title VII contemplates an EEOC administrative adjudication where a federal agency is the respondent, specifically authorizes the EEOC to determine in the first instance what constitutes "appropriate" relief. *See* 42 U.S.C. § 2000e-16(b) ("[T]he [EEOC] shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section."). Congress clearly knew how to draft language granting first-level adjudicative remedial authority to the EEOC, yet chose not to under Section 706 or Section 1981A.

Title VII also differs sharply from the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 et seq., under which

EEOC of any statutory prerogative, then, the court of appeals in this case simply fulfilled its own statutory obligation to determine the appropriate relief given Baker's agreement to arbitrate his claims with Waffle House. As will be demonstrated *infra*, the court of appeals correctly held that, in an EEOC action brought on behalf of a particular employee in a judicial forum, granting employee-specific remedies does not constitute appropriate relief where the employee at issue validly waived his right to a judicial forum.

II. UNDER TITLE VII, THE APPROPRIATE RELIEF THAT A COURT MAY GRANT IS CIRCUMSCRIBED BY THE EMPLOYEE'S PRIOR WAIVER, SETTLEMENT, OR ADJUDICATION OF HIS RIGHTS.

The government contends that "Congress has expressly provided [in Title VII] that the EEOC may obtain all of the

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Congress provided for exclusive agency enforcement and did not provide for a general private right of action. Congress quite deliberately rejected the NLRA model, under which an agency has investigatory *and* adjudicative powers, when it enacted Title VII in 1964:

> The enforcement mechanisms that Congress established for [Title VII] reflect the opinions of some members of Congress that the final determination of what constitutes unlawful employment practices and the relief from these practices should be made by the federal judiciary. . . . Congress was unwilling to remit the enforcement power to effectuate [Title VII] to the [NLRA-type] form of discretionary justice administered by a federal administrative agency.

Robert Belton, *Harnessing Discretionary Justice in the Employment Discrimination Cases: The Moody and Franks Standards*, 44 OHIO ST. L. J. 571, 581-82 (1983).

forms of relief authorized by statute in [federal court actions brought by the EEOC], including victim-specific relief such as back pay, reinstatement, and compensatory and punitive damages." EEOC Br. 11. As explained *supra*, and contrary to the EEOC's suggestion, the EEOC may – in any particular lawsuit – obtain only those remedies that the courts have deemed "appropriate" in that type of case.

It is true that Title VII and the 1991 amendments provide for a wide range of potential remedies, both broad-based and employee-specific. But the fact that Section 706(g) requires that a court determine what relief is "appropriate" suggests that some remedies contemplated by the statute may be inappropriate in a particular case or type of case. In order to determine whether a particular remedy is appropriate or inappropriate, a court must necessarily consider the particular circumstances of the employee on whose behalf the lawsuit has been filed.[7]

Certain remedies may be rendered inappropriate by the employee's own actions or circumstances. This principle is well-settled in the context of employee lawsuits under the anti-discrimination statutes. *See, e.g., McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) (after-acquired evidence that employee has engaged in misconduct will affect reinstatement, front pay, and post-discovery back pay); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) (fact that employee has initiated proceeding in state court on his state law claim will bar any federal relief under 28 U.S.C. § 1738); *Univ. of Tenn. v. Elliott*, 478 U.S. 788

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[7] For many of the Title VII employee-specific remedies – including back pay, reinstatement, and front pay – the "appropriateness" inquiry requires an equitable consideration of what relief would make the employee "whole," that is, return him to the position he would have been in absent the unlawful discrimination. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975).

(1986) (where employee has initiated state administrative adjudication, federal relief is barred under federal common law of preclusion). And *Circuit City* further established that, just as an employee may render himself ineligible for certain remedies through actions such as misconduct, failure to mitigate, or prior settlement or adjudication, the employee may also render himself ineligible for any judicial remedies by agreeing to arbitrate his claims. *See Circuit City*, 121 S. Ct. at 1306; *Gilmer*, 500 U.S. at 23. In this case, for example, it would be inappropriate for a court to grant Baker judicial remedies in a lawsuit brought on his own behalf.

This "appropriate[ness]" principle applies regardless of who brings the lawsuit – whether the EEOC or the individual employee. The EEOC objects that, in this case, it "has not agreed to arbitrate," and therefore it should not be bound by the employee's decision to do so. EEOC Br. 13; *see also* Brief of the AFL-CIO as *Amicus Curiae* in Support of Petitioner ("AFL-CIO Br.") 11-12. That argument ignores the critical difference between the action that the EEOC is entitled to bring under Section 706(f), on the one hand, and the relief that a court may grant under Section 706(g) and the 1991 amendments, on the other. The Fourth Circuit expressly held that the EEOC is not bound by the arbitration agreement and may still bring its own cause of action against Waffle House. It also correctly held, however, that the relief the EEOC may seek is limited by the employee's arbitration agreement. That holding is consistent with numerous Title VII cases in a variety of contexts. Under those precedents, the EEOC's *scope of recovery* is frequently limited by the unilateral voluntary actions of the employee on whose behalf the agency brings an action. The precise rationales of those cases differ, but they all stand for the fundamental proposition "that a charging party's actions that impede his own right to sue *can* also circumscribe the contours of the EEOC's suit in its own name to the extent that it acts on

behalf of the charging party." *Waffle House*, 193 F.3d at 813 (emphasis added).

Thus, for example:

- If the employee failed to mitigate her damages, the EEOC's ability to recover employee-specific remedies on her behalf is significantly limited. *See, e.g., Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (holding that where employee's rejection of reinstatement offer would limit employee's ability to recover back pay and front pay in a private action, EEOC is bound by the same limits).

- If the employee signed a release waiving all claims against his employer, the EEOC may not recover employee-specific relief on that employee's behalf. *See, e.g., EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (noting in dicta that "the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf"); *Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (noting the EEOC's concession that the plaintiff's waiver of her Title VII rights also precluded the EEOC from taking action).

- If the employee's claim was previously resolved through arbitration, the EEOC may not recover employee-specific remedies on the employee's behalf. *See, e.g., EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1011 (6th Cir. 1975) (complainant who received arbitration award based on his workplace discrimination claims "is not to recover any 'private benefit,' such as back pay," from the EEOC's action).

- If the employee settled his private lawsuit prior to the EEOC's action, the EEOC may not obtain employee-specific remedies on behalf of that employee. *See, e.g., EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 n.5 (1st Cir. 1996) (noting with approval that "the court below specifically held that settling employees had waived the right to recover damages in either their own lawsuits or in lawsuits brought by the EEOC on their behalf"); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (applying mootness doctrine to bar EEOC from seeking back pay when complainant had entered into binding settlement of her Title VII claims).

- If the employee lost on the merits in a prior private lawsuit, the EEOC may not obtain employee-specific remedies on his behalf. *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (applying theories of privity and res judicata in holding that the dismissal of plaintiff's private action "bars recovery by the EEOC of backpay, liquidated damages, and reinstatement in his behalf"); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (because individuals should not be able to "relitigate the same claim through a representative any more than they could relitigate the same claim on their own behalf," complainants "who fully litigated their own claims under the ADEA are precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims"); *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 525 (5th Cir. 1980) ("[T]he EEOC may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the

EEOC seeks relief different from that sought by the individual.").

The above-cited cases demonstrate that even though the EEOC is not technically bound by the employer-employee arbitration contract, the EEOC is always bound by the particular circumstances of the employee on whose behalf it wishes to bring suit. Title VII, in other words, requires the EEOC to take its employee as it finds him.[8]

Contrary to the government's extensive reliance throughout its brief on *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980), the basic holding of that case – that the EEOC need not abide by Federal Rule of Civil Procedure 23 governing class actions when suing in its own right – has no application to this case. Moreover, *General Telephone* explicitly confirms the proposition that the EEOC may recover only "appropriate" relief under Title VII. *See id.* at 324-25 ("We do no more than follow a straightforward reading of the statute, which seems to us to authorize the EEOC to sue in its own name to enforce federal law by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act."). Although

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[8] The EEOC attempts in a footnote to distinguish the present litigation from cases involving "a prior private settlement or judgment" by baldly stating that the question in this case is "not one of res judicata or mootness, but rather whether Baker's mere choice of an arbitral forum for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action." EEOC Br. 41 n.13. The EEOC does not explain, however, why "Baker's mere choice of an arbitral forum" is different in any sense relevant here from any other employee choice to take action that compromises the viability of his claim (such as failing to mitigate damages, rejecting an offer of reinstatement, or entering into a settlement or release agreement). *Id.*

the government makes much of the Court's statement that the EEOC "'is not merely a proxy for the victims of discrimination,'" EEOC Br. 31 (quoting *General Telephone*, 446 U.S. at 326), we do not rely in this brief on the premise that the EEOC acts as a "representative" or "proxy" when it sues on behalf of an individual. Rather, under the statute, the EEOC – like a private litigant – may recover only that relief which is "appropriate" in light of the individual employee's circumstances. As even the EEOC acknowledges (EEOC Br. 41), *General Telephone* also held that courts "are not powerless to prevent undue hardship to the defendant and should perform accordingly," and thus that "[i]t . . . goes without saying that the courts can and should preclude double recovery by an individual." 446 U.S. at 333. Under that principle, an individual who has relinquished some of his rights may not regain those rights by way of an EEOC action on his behalf.

The opposite conclusion, advocated by the government, simply cannot be correct. Taken to its logical conclusion, the government's argument that it is authorized to "obtain all statutory remedies in any action that it brings," EEOC Br. 18, defies not only the statute, but also common sense. The scope of appropriate employee-specific relief necessarily depends on the particular employee's circumstances. For example, an order of reinstatement clearly would not be "appropriate" relief in a case where the employee at issue left his job voluntarily, or where the employee has obtained the same or better position elsewhere and does not want to return to his old job. Similarly, recovery of damages would not be appropriate where the employee has already recovered full or partial damages in a prior settlement.

The EEOC and *amici* are compelled to acknowledge that amounts obtained in prior, non-government-supervised settlements or arbitrations must be taken into account in determining the remedies the EEOC may recover on that

employee's behalf,[9] although they try to frame their concession in terms of a free-floating policy against double recovery. *See* EEOC Br. 40-41; *see* AFL-CIO Br. 18-19. In spite of the clear implications of that concession, the EEOC steadfastly maintains that it may obtain any remedy in any case. On the contrary, Congress clearly contemplated that – in determining what relief was appropriate in any given case – the courts would take account of the particular circumstances of the employee, and would adjust, limit, or eliminate employee-specific remedies accordingly.[10]

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[9] Section 706(g)(1)(a) explicitly provides that an employee is ineligible for back pay if he fails to mitigate his damages. *See, e.g.*, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 (1982) (Title VII claimant represented by EEOC "forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied"). Notably, the government and its *amici* admit that the basic principle behind the mitigation clause extends beyond its literal application in the back pay context to a general court-administered bar against employee windfalls or double recoveries of any kind. *See* AFL-CIO Br. 18-19 ("[A]ny amount previously received by an individual pursuant to a private settlement should undoubtedly be deducted from the back pay awarded to that individual in a suit brought by the EEOC."); EEOC Br. 40-41.

[10] The EEOC's proposed scheme of offsetting any money recovered by the EEOC on behalf of an individual by the amount received by such individual under a private settlement agreement fails to provide workable solutions to a number of prickly remedial problems. For example, if the EEOC were to recover a smaller amount in court than the individual received per the terms of the settlement agreement, it is unclear under the EEOC's theory whether the individual should have to return the difference to the employer or whether she should be permitted to keep the larger award. Even more important is the effect the EEOC's proposed scheme would have on the settlement of employment discrimination claims generally. Employers (like all litigants) settle discrimination claims to avoid the costs, time, and uncertainty associated with litigation. If employers are exposed to

The EEOC and its *amici* attempt to circumvent the text and structure of Title VII by falling back on a policy argument, *i.e.*, that barring the EEOC from obtaining employee-specific relief in a judicial forum on behalf of an employee who has agreed to arbitrate her claims contravenes the public purpose of Title VII. The EEOC asserts that its ability to recover employee-specific remedies is essential "to the public – not merely private – goals of the antidiscrimination statutes" because such remedies "serve[] both 'deterrence and * * * compensation objectives,'" EEOC Br. 33 (citation omitted) – a proposition which relies on the implicit assumption that arbitration will fail to accomplish the same objectives. The AFL-CIO adds that limiting the EEOC's recovery of such remedies through private arbitration agreements would "recreate the situation the 1972 amendments were intended to remedy, *i.e.*, one in which 'the EEOC presents largely an ineffectual threat.'" AFL-CIO Br. 10 (citation omitted).

Those arguments fail for several reasons. First, the import of the 1972 amendments to Title VII is mischaracterized. Prior to the amendments, the EEOC lacked any authority to initiate litigation of any kind, whether for injunctive or individual-specific relief. The agency thus presented an "ineffectual threat" because it relied entirely on moral suasion. The amendments to Title VII authorized the EEOC to sue for "appropriate" relief in its own cause of action.

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the risk of having to defend claims for individualized relief brought by the EEOC, notwithstanding settlements they have reached with respect to those claims, employers will have little if any incentive to settle. Such a result not only would defy the judicial policy favoring private settlements, but it would also defy the congressional preference for private settlements embodied in the very statute at issue – Title VII. *See infra* discussion of Section 118 of the Civil Rights Act of 1991.

Second, even in cases where employee-specific remedies are not "appropriate," the EEOC is able to vindicate its role of acting in the public interest by seeking injunctive, including structural, relief. As the Fourth Circuit made quite clear in its opinion, the EEOC retains its full powers to pursue broad-based injunctive relief despite the fact that employee-specific remedies may be unavailable due to an arbitration agreement. Any employer who violated such an injunction could be held in contempt.

Third, both Congress and this Court have squarely rejected the premise of the EEOC and *amici*'s arguments, *i.e.*, that arbitration is an inferior means of enforcing statutory rights and resolving claims.[11] In the 1991

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[11] Despite this Court's rulings to the contrary, the EEOC and *amici* stress that arbitration, however it is structured, does not effectively enforce Title VII and ADA rights. This contention flies in the face of studies, some by leading plaintiff advocates such as Lewis Maltby, that consistently find higher win rates for employees in arbitration than in court. *See, e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45-55 (1998) (citing multiple studies, including the author's, for the proposition that employee-plaintiff win rates in arbitration are variously estimated at 51%, 63%, 68%, and 73%; employee-plaintiff win rates in employment litigation are variously estimated at 15%, 17%, 24%, and 28%). Indeed, it may be that arbitration's "simplicity, informality, and expedition," *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), serve to improve aggrieved employees' access to meaningful justice, both by dramatically expanding the pool of actual claimants and by providing rapid adjudication and relief. *See, e.g.*, Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 8 (1998); Estreicher, *supra* note 2; Note, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1894 (2000).

amendments to Title VII and the ADA, Congress made clear that arbitration was not only a suitable means for the resolution of statutory discrimination claims, but also a favored one. *See infra* discussion of Section 118 of the Civil Rights Act of 1991. Likewise, this Court in several cases has "recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).[12] Just like judicial

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A number of the petitioner-side *amici* rely on early research by Lisa Bingham that purportedly establishes a "repeat player" advantage enjoyed by some employers in arbitration. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997). However, Bingham's study "did not control for some rather obvious variables that may explain positive employer outcomes, such as the size of an employer and the presence of a personnel department." Estreicher, *supra* note 2, at 567. Subsequent work based on broader data sets found a diminished "repeat player" effect and *no* statistically significant repeat arbitrator effect (*i.e.*, that an employer confronting the same arbitrator in a second case has a higher probability of success). *See id.* (citing unpublished study by Lisa B. Bingham & Simon Sarraf).

Moreover, the "repeat player" hypothesis is fundamentally flawed for its failure to take into account that employee-claimants are just as likely to have "repeat players" on their side in arbitration. The plaintiff bar in the employment arena has organized itself into a national information-sharing network, the National Employment Lawyers Association, which enables attorneys for employee-claimants to make intelligent selections of arbitrators and monitors arbiter performance.

[12] This Court has concomitantly rejected virtually all of the policy arguments that the government and its *amici* put forth in this case, including claims that "arbitration panels will be biased," that discovery in the arbitral forum will be inadequate, that arbitral forums do not issue written opinions, that judicial review of

resolution, arbitration may result in back pay, front pay, reinstatement, compensatory and punitive damages, and other remedies designed to deter and compensate, thus fulfilling the public purposes of Title VII. "[S]o long as the prospective litigant effectively may vindicate [her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637; *see also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90 (2000) (citing cases). As a result, this Court "has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City*, 121 S. Ct. at 1313. In the ADEA context, for example, this Court noted that it is "unpersuaded by the argument that arbitration will undermine the role of the EEOC." *Gilmer*, 500 U.S. at 28. The EEOC here has raised no relevant distinction between the ADEA and Title VII or the ADA that would justify a different result in this case. In substance, the EEOC's brief merely attempts to relitigate the holdings of *Gilmer* and *Circuit City*.

Finally, Congress did not contemplate that back pay and other employee-specific remedies would be available in

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arbitration decisions is too limited, that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions," and that "there often will be unequal bargaining power between employers and employees." *Gilmer*, 500 U.S. at 30-33. Such generalized attacks "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" and, as such, are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 481 (1989).

all cases; these remedies are not the equivalent of a civil penalty scheme. Instead, Title VII puts ordinary principles of mitigation and encouraging out-of-court settlement of claims above the purpose of imposing the maximum financial penalty on an employer.[13]

III. ALLOWING EMPLOYEE-SPECIFIC REMEDIES IN AN EEOC ACTION ON BEHALF OF AN EMPLOYEE WHO HAS AGREED TO ARBITRATE HER CLAIMS WOULD CONTRAVENE THE FEDERAL ARBITRATION ACT AND IS INCONSISTENT WITH THIS COURT'S PRECEDENTS.

Excluding employee-specific judicial remedies from the permissible scope of relief in a Title VII action filed on behalf of an employee who has bound herself to an arbitration agreement is required by "liberal federal policy favoring arbitration agreements" embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Gilmer*, 500 U.S. at 26 ("It is by now clear

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[13] Thus, even if it were true that arbitration results in lower employee-specific awards in *comparable* cases than does judicial resolution (a proposition that has not been empirically verified), the EEOC's argument – that requiring the agency to take its employee as it finds her is inconsistent with Title VII's public purpose of deterring future discrimination – would be unpersuasive. In assessing the effectiveness of Title VII in terms of deterring discrimination, there is no principled distinction between, on the one hand, an EEOC action where an employee through a private settlement renders himself ineligible for any judicially ordered remedies, and, on the other hand, an EEOC action where the employee through signing an arbitration agreement renders himself ineligible for the same judicially ordered remedies. If one case does not subvert the statute, neither does the other.

that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."); *see also Circuit City*, 121 S. Ct. at 1313 (holding that FAA exception exempts contracts of employment of transportation workers – but not other employment contracts – from the FAA's coverage).

Under this Court's FAA jurisprudence, it is clear that there is a strong federal presumption of arbitrability. Under that presumption, parties to a pre-dispute agreement to arbitrate their future disputes in a final, binding manner have a federal right to enforce that agreement. The presumption applies even when the dispute involves statutory employment discrimination claims, as in *Gilmer*, and when the arbitration promise covering such claims is negotiated as a condition of obtaining employment, as in *Circuit City*. For over a decade and a half, this Court has stated and restated that this federal right to the benefit of the arbitration bargain can only be overridden by express language in – or an absolutely necessary implication from – another federal statute, thus indicating a congressional override of the baseline presumption of FAA enforceability.[14] This Court already has held in *Gilmer* that there is nothing in the ADEA that effects such an override of the FAA; and it has established that, in many respects, the ADEA and Title VII (and by extension, the ADA) are to be read "'virtually *in haec verba*,'" *EEOC v. Commercial Office Products Co.*,

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[14] *See, e.g.*, *Gilmer*, 500 U.S. at 29 (override of FAA not found where Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims (under the ADEA), even in its recent amendments"); *Mitsubishi*, 473 U.S. at 628 ("[I]f Congress intended the substantive protection afforded [by the federal antitrust laws] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."); *see also Green Tree Fin. Corp.*, 531 U.S. at 89-90 (citing *Gilmer* and *Mitsubishi* with approval).

486 U.S. 107, 123 (1988) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979)). There is no reason to believe that Title VII should be read differently than the ADEA with respect to the enforceability of pre-dispute arbitration agreements.

One searches in vain for any language in Title VII or the ADA that might be read to accomplish such an override of the FAA's baseline presumption. Tellingly, neither the EEOC nor any of its amici point to such language. Indeed, the text of Title VII and the ADA, if anything, expresses a policy in support of arbitration, among other means of alternative dispute resolution. Thus, Section 118 of the Civil Rights Act of 1991 states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.*

Pub. L. 102-166, 105 Stat. 1071, 1081 (1991) (emphasis added).[15] Among "the Acts or provisions of federal law"

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[15] To promote uniformity in this area in accordance with established principles of this Court's FAA jurisprudence, the Court may wish in this case expressly to reject the interpretation of the Ninth Circuit that this language in Section 118 can somehow be read as a Title VII override of the FAA presumption of enforceability of predispute arbitration agreements. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). Notably, every other circuit that has passed on this issue has rejected *Duffield*'s reading, and has held that Title VII and ADA claims are arbitrable in the same way that ADEA claims are arbitrable after *Gilmer*. *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 11 (1st Cir. 1999); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 148-50 (1st Cir. 1998) (regarding ADA claims); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998); *Miller v. Public Storage Mgmt.*, 121 F.3d 215 (5th Cir. 1997).

amended by the 1991 legislation are Title VII, the ADEA, and the ADA.

And yet, if the EEOC is permitted to bring a suit for, and recover, employee-specific relief in a case where the employee signed an arbitration agreement, the arbitration agreement has in effect been reduced to a nullity. By the simple expedient of deciding to sue on the complaining party's behalf,[16] the EEOC can free the complaining party of the consequences of his prior arbitration agreement. Instead of a bargained-for single proceeding which both parties ex ante had preferred for the resolution of their future claims, there will now be two proceedings in two different forums seeking (insofar as individual-specific relief is concerned) precisely the same relief: one before the arbitrator, and one before a federal court in the EEOC-styled action. The inability to hold complaining parties to the benefit (and responsibilities) of the bargain, the duplication of proceedings, the inevitable race to judgment in the two forums, and the possibility of inconsistent relief – are certainly enough to discourage any willingness ex ante to agree to arbitration in the first place.

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[16] An EEOC suit may not even be required. The EEOC's brief suggests that by simply withholding the issuance of a "right to sue" letter, the agency can stymie indefinitely the promised finality of arbitration. *See* EEOC Br. 21 n.6 ("Even after the 180-day period, a private suit may be commenced only if the charging party has received a right-to-sue letter from the EEOC.") (citing 42 U.S.C. § 2000e-5(f)(1)). As this Court held in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977), Section 706(f)(1) "imposes no [time] limitation upon the power of the EEOC to file suit in a federal court." *Id.* at 366.

The EEOC argues that "[t]he terms or policies of the FAA are fully vindicated by holding the private complainant (who agreed to arbitration) to his agreement, while permitting the EEOC (which has not agreed to arbitration) to pursue the full range of remedial options authorized by the antidiscrimination statutes." EEOC Br. 25. Contrary to this characterization, the government's position permits the employee to avoid her arbitration agreement and recover (through the EEOC) relief in a judicial forum that she previously waived in favor of arbitral remedies. The EEOC tries to avoid this obvious fact by arguing that the employee in that situation agrees "to forego that statutory right to intervene in a judicial action brought by the EEOC," *id.* at 27, but the EEOC's grant to the employee of any employee-specific damages awarded in the lawsuit is not dependent on the employee's right to intervene. Thus, in the EEOC's view, all that arbitration accomplishes – despite this Court's repeated insistence to the contrary in its FAA rulings culminating most recently in *Circuit City* – is the waiver of the employee's right to intervene in the EEOC-styled action. The agency's view is absurd on its face, and confirms the bankruptcy of the reading it urges on this Court.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 99-1823

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent Waffle House, Inc. before this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 350 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to proper interpretation and application of equal employment laws and regulations. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment, including agreements to arbitrate disputes arising out of the employment relationship. EEAC's members are interested in the extent to which such contractual commitments to arbitrate provide the exclusive forum for resolving covered employment disputes, and in the ability or the inability of public enforcement agencies to circumvent such choices of forum.

Thus, the issue presented in this case, namely, whether the U.S. Equal Employment Opportunity Commission (EEOC) may pursue victim-specific remedies on behalf of an employee who has agreed to arbitrate such claims, is extremely important to the nationwide corporate constituency that EEAC represents. The Court of Appeals properly limited the EEOC's remedies in this case to injunctive relief where

the employee for whom the agency sought individual relief voluntarily agreed to submit his claims to an arbitral forum. In so doing, the lower court upheld the strong public policy, which this Court recently reaffirmed in *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001), in favor of arbitration as an alternative means of resolving employment-related disputes. Because of its interest in the enforcement and effect of agreements to arbitrate employment-related disputes, EEAC filed *amicus curiae* briefs with this Court in *Circuit City* and in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Thus, EEAC has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency authorized to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, as well as other federal employment nondiscrimination laws. Respondent Waffle House, Inc. is a private employer subject to these and other federal and state employment nondiscrimination laws.

Waffle House maintains a standard employment application form, which contains a provision requiring applicants, as a condition of employment, to agree to arbitrate any future employment-related disputes. Applicants who elect not to sign the application form and thereby submit future claims to arbitration are not considered for employment.

In 1994, Eric Scott Baker completed and signed an application for employment with Waffle House at its

Columbia, South Carolina facility. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 807 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001). After declining to accept a position at the Columbia facility, Baker was referred to another Waffle House facility located in West Columbia, South Carolina, where he was offered and accepted a position as a grill operator. Baker did not complete another application at the West Columbia location. Waffle House terminated Baker's employment shortly thereafter. *Id.*

Upon the termination of his employment, Baker filed a charge of discrimination with the EEOC, alleging that Waffle House engaged in discriminatory employment practices in violation of the ADA. *Id.* After investigating Baker's charge, the EEOC filed a public enforcement action, in which it sought permanent injunctive relief against Waffle House, as well as back pay, reinstatement, and compensatory and punitive damages on behalf of Baker individually.

Waffle House filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, to compel arbitration of Baker's claim pursuant to the arbitration agreement he signed as part of his employment application. 193 F.3d at 808. The U.S. District Court for the District of South Carolina denied the petition, ruling that Baker and the Waffle House had not entered into a valid arbitration agreement with respect to Baker's employment at the West Columbia, South Carolina facility. *Id.*

On appeal, the U.S. Court of Appeals for the Fourth Circuit concluded that the arbitration agreement contained in Baker's signed employment application was valid and governed his employment with Waffle House at the West Columbia facility, even though Baker never completed a new application there. *Id.*[2] It ruled further that the EEOC, while

[2] The validity of the arbitration agreement is not now before this Court and therefore, for purposes of this matter, is resolved.

not compelled to arbitrate its own claims, was precluded from seeking individual remedies on behalf of Baker as a result of his agreement with Waffle House to arbitrate all employment-related claims. 193 F.3d at 812. Thus, the Court of Appeals determined that the EEOC was permitted only to seek injunctive relief in its public enforcement role. *Id.*

On May 15, 2000, the EEOC filed a petition with this Court for a writ of certiorari on the issue of whether it may pursue victim-specific remedies as part of a public enforcement action in its own name, where the employee on whose behalf the relief is sought has entered into a valid agreement to arbitrate employment claims. The Court granted the petition.

SUMMARY OF ARGUMENT

In ruling that the EEOC may not pursue victim-specific remedies on behalf of an individual who has agreed to arbitrate his employment claims, the court below joins the U.S. Courts of Appeals for the Second and the Eighth Circuits in imposing similar limitations on the relief available in public enforcement actions. *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir.), *cert. denied*, 121 S. Ct. 383 (2000). In fact, the Sixth Circuit is the only federal appellate court to rule to the contrary. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999). Because the Sixth Circuit misapprehended the interrelationship of an EEOC enforcement action and an employee's voluntary agreement to arbitrate her discrimination claims, this Court should reject that court's holding in *Frank's Nursery* and adopt the well-reasoned approach taken by the Second, Fourth and Eighth Circuits.

While the government attempts in its brief to this Court to decouple the EEOC's enforcement authority under Title VII from the various means by which an individual charging party may resolve his or her claims, the two pursuits are, in

fact, interrelated. In particular, an individual's contractual and other choices limit the extent to which the agency can pursue relief on that individual's behalf. U.S. Equal Employment Opportunity Commission, *EEOC: Guidance on Waivers Under the ADA and Other Civil Rights Laws*, EEOC Compl. Man. (BNA) N:2345, N:2347 (Apr. 10, 1997)(citing *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996); *EEOC v. Cosmair*, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. United States Steel Corp.*, 671 F. Supp. 351, 358 (W.D. Pa. 1987), *rev'd on other grounds*, 921 F.2d 489 (3d Cir. 1990)).

This Court long has recognized the validity of arbitration as a means of resolving employment-related disputes. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court ruled that claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, can be subject to compulsory arbitration. In so doing, the Court reiterated its "strong endorsement of the federal statutes favoring this method of resolving disputes." 500 U.S. at 30 (citation omitted). Most recently, in *Circuit City Stores, Inc. v. Adams*, the Court reaffirmed the strong public policy favoring agreements to arbitrate employment disputes, acknowledging the "real benefits to the enforcement of arbitration provisions" while soundly rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001).

Permitting the EEOC to pursue monetary damages on behalf of individuals who have signed valid agreements to arbitrate their employment claims would countermand this Court's pronouncements in *Circuit City* and *Gilmer* by thwarting the primary purpose for which arbitration is used—to replace the costs and delays of protracted litigation with the efficiency and finality of the arbitral forum. It also would substantially undermine any incentive employers now have to enter into arbitration agreements.

ARGUMENT

I. THIS COURT SHOULD ENDORSE THE WELL-REASONED APPROACH TAKEN BY THE SECOND, FOURTH, AND EIGHTH CIRCUIT COURTS OF APPEALS, WHICH STRIKES A PROPER BALANCE BETWEEN THE GOVERNMENT'S DUTY TO ERADICATE UNLAWFUL DISCRIMINATION AND THE STRONG PUBLIC POLICY FAVORING PRIVATE AGREEMENTS TO ARBITRATE

A. The Court Below Joins the Second and Eighth Circuit Courts of Appeals in Properly Disallowing Pursuit of Victim-Specific Relief in a Public Enforcement Action on Behalf of an Individual Who Has Agreed To Arbitrate Employment-Related Claims

In ruling that the EEOC may not pursue victim-specific remedies on behalf of an individual who voluntarily has agreed to arbitrate his employment claims, the Court of Appeals joins the Second and the Eighth Circuits in imposing similar limitations on the relief available in public enforcement actions. *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir.), *cert. denied*, 121 S. Ct. 383 (2000). In *Kidder, Peabody*, the EEOC initiated a public enforcement action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, in which it sought back pay, reinstatement, and liquidated damages on behalf of a class of former Kidder investment bankers, all of whom had signed valid agreements to arbitrate employment

claims.[3] 156 F.3d at 300. Kidder moved to dismiss the EEOC's action, arguing that the arbitration agreement each former employee had signed precluded the EEOC from pursuing victim-specific remedies on their behalf.[4] *Id.*

Relying on this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, the district court granted Kidder's motion to dismiss. It reasoned that permitting the EEOC to pursue victim-specific remedies on behalf of former employees who had agreed to arbitrate their employment claims "would frustrate the purpose of the FAA because an employee, having signed the agreement to arbitrate, could avoid arbitration by having the EEOC file in the federal forum seeking back pay on his or her behalf." 156 F.3d at 300.

On appeal, the Second Circuit affirmed the district court's dismissal of the EEOC's action, relying, as the district court had, on *Gilmer*. Noting the competing interests between "allowing the EEOC broad authority to pursue actions to eradicate and prevent employment discrimination" and "encouraging parties to arbitrate," the court reasoned:

> [T]he result reached by the district court, allowing the EEOC to pursue injunctive relief in the federal forum while encouraging arbitration of the employee's claim for private remedies, strikes the right balance between these interests. Further, to permit an individual, who has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages

[3] Although the EEOC initially sought injunctive relief in addition to victim-specific remedies, it dropped that claim after Kidder, Peabody discontinued its investment banking operations. 156 F.3d at 300.

[4] Indeed, three of the nine investment bankers on whose behalf the EEOC sought make-whole relief unsuccessfully had arbitrated their claims while the agency's action was being litigated.

> on his or her behalf would undermine the *Gilmer* decision and the FAA.

156 F.3d at 303.

Applying the Second Circuit's holding in *Kidder, Peabody*, the Eighth Circuit in *Merrill, Lynch v. Nixon* ruled correctly that the Missouri Commission on Human Rights (MCHR) could seek injunctive but not monetary relief in a state administrative action, brought in its own name, on behalf of an employee who voluntarily had agreed to arbitrate his employment-related disputes. *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir.), *cert. denied*, 121 S. Ct. 383 (2000). The Eighth Circuit explained that when a public enforcement agency seeks victim-specific relief "such as back pay [which] is highly individual in nature . . . [it] acts more as a representative for [the employee] than as a separate entity seeking to vindicate public rights." 210 F.3d at 818. The agency therefore may not pursue such remedies on behalf of an employee who voluntarily has agreed to submit his individual claims to an arbitral forum.

Considering "whether the federal arbitration statutes create some federal right for Merrill, Lynch, and whether the actions of the MCHR in this case would interfere with that right," the court concluded, "the answer to both questions is yes." 210 F.3d at 817. It reasoned that the Civil Rights Act of 1991 confirms the right of employers and employees to enter into private agreements to arbitrate employment-related disputes and determined that allowing the MCHR to proceed with its action on claims subject to arbitration "would interfere with this right." *Id.*

The Sixth Circuit is the only federal appellate court to rule that a public enforcement agency may pursue victim-specific remedies where the employee on whose behalf the relief is sought is subject to a valid arbitration agreement. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999). As more fully set forth below, the Sixth Circuit

misapprehended the interrelationship of an EEOC enforcement action and an employee's voluntary agreement to arbitrate his or her discrimination claims. Accordingly, this Court should reject that court's holding in *Frank's Nursery* and adopt the well-reasoned approach taken by the Second, Fourth and Eighth Circuits.

B. The EEOC's Enforcement Authority Under Title VII and an Individual's Conduct in Resolving Statutory Claims Are Not Mutually Exclusive

The EEOC is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As the EEOC points out in its brief to this Court, the agency's authority under Title VII includes the right "to bring a civil action against any respondent . . . named in the charge." 42 U.S.C. § 2000e-5(f)(1). If the EEOC elects not to pursue an action against a respondent to a Title VII charge of discrimination, it must notify the charging party of his or her right to pursue a private right of action in federal court. *Id.*

While the government attempts to minimize the relationship between its enforcement authority under Title VII and the various means by which an individual charging party may resolve his or her claims, the two pursuits are, in fact, closely intertwined. As a practical matter, the individual's actions in making contractual and other choices directly affect the relief that the EEOC may seek. In particular, as the government concedes in its brief, an individual's own conduct in resolving his or her claim may limit the extent to which the agency is permitted to pursue

monetary relief on that individual's behalf. Pet. Br. at 38-39 n.13.

In guidance to its own investigative staff, the EEOC confirmed that it cannot obtain remedies on behalf of an individual who has settled his or her claim:

> [E]ven though an individual who has signed a waiver agreement or otherwise settled a claim subsequently files a charge with the Commission based on the same claim, the employer will be shielded against any further recovery by the charging party provided the waiver agreement or settlement is valid under applicable law. This is true whether the EEOC or the private individual brings a subsequent action.

U.S. Equal Employment Opportunity Commission, *EEOC: Guidance on Waivers Under the ADA and Other Civil Rights Laws*, EEOC Compl. Man. (BNA) N:2345, N:2347 (Apr. 10 1997) (citing *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996); *EEOC v. Cosmair*, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. United States Steel Corp.*, 671 F. Supp. 351, 358 (W.D. Pa. 1987), *rev'd on other grounds*, 921 F.2d 489 (3d Cir. 1990)). The EEOC guidance further explains:

> [A]lthough an employee cannot waive the right to file a charge with the EEOC, he can waive the right to recover in his own lawsuit as well as the right to recover in a lawsuit brought by the EEOC on his behalf.

Id. (citing *Cosmair*, 821 F.2d at 1091).

As the Second Circuit held in *Kidder, Peabody*, the same logic applies here. *Kidder, Peabody*, 156 F.3d at 302-03. An individual's decision to waive Title VII rights by settlement and release, or the election to have those rights adjudicated in an arbitral forum, precludes the EEOC from seeking remedies on his behalf.

Moreover, Title VII provides expressly that "[i]nterim earnings or amounts earnable with reasonable diligence by

the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1). Similarly, an individual's own misconduct may restrict the amount and types of relief available. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361-62 (1995) (holding that after-acquired evidence of misconduct justifying termination precludes reinstatement and front pay and limits back pay award.)

Thus, agreeing to arbitrate is only one of several means by which an individual is able to affect the extent to which the EEOC is able to pursue individual remedies in a public enforcement action on his or her behalf. While the EEOC maintains that its interests are independent of and go beyond the interests of the individual employee, the fact still remains that its pursuit of monetary relief is on behalf of that employee individually.

Neither the EEOC nor its *amici* suggest that the monetary relief it seeks in such a public enforcement action lands anywhere other than in the hands of the employee on whose behalf the action was pursued. The only "interest" that is served by victim-specific relief is the individual's. The EEOC's contention that its pursuit of such relief is in the "public interest" therefore is disingenuous, at best.

This Court should apply the logic employed by a number of federal courts in similar contexts, and in the past by the EEOC, and disallow the EEOC from seeking victim-specific relief on behalf of an individual who is subject to a valid agreement to arbitrate.

II. AUTHORIZING THE EEOC TO PURSUE VICTIM-SPECIFIC REMEDIES ON BEHALF OF INDIVIDUALS WHO ARE SUBJECT TO VALID AGREEMENTS TO ARBITRATE EMPLOYMENT CLAIMS WOULD UNDERMINE THE STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION

A. The Court Has Confirmed Repeatedly That Arbitration Is a Valid Means of Resolving Employment-Related Disputes, Most Recently in *Circuit City v. Adams*

In *Gilmer v. Interstate/Johnson Lane Corp.*, this Court confirmed the validity of arbitration as a means of resolving employment-related disputes. 500 U.S. 20 (1991) (ruling that claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, can be subject to compulsory arbitration). In so doing, the Court reiterated its "strong endorsement of the federal statutes favoring this method of resolving claims." 500 U.S. at 30 (citation omitted).

Even prior to *Gilmer*, the Court recognized arbitration as the preferred method of resolving workplace grievances. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *see also United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *and United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) ("Steelworker's Trilogy").[5]

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[5] The first of the Steelworkers Trilogy was *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). In that case, the Supreme Court concluded that only by giving "full play" to the means chosen for settlement—arbitration—would the congressional policy in Section 203(d) of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act") be effectuated. *Id.* at 566. Therefore, the Court granted the union's petition to compel arbitration. Likewise, in *United*

Most recently, in *Circuit City Stores, Inc. v. Adams*, this Court reaffirmed the strong public policy favoring agreements to arbitrate employment disputes, acknowledging the "real benefits to the enforcement of arbitration provisions" while soundly rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001). As the Court reasoned, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* Thus, to exempt employment contracts from coverage under the FAA "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Id.* (citation omitted).

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the union petitioned the Court to compel arbitration by the employer. The Court noted that the "present federal policy is to promote industrial stabilization through the collective bargaining agreement." *Id.* at 578 (footnote omitted). The Court then remarked that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *Id.* (footnote omitted). In addition, the Court noted that mandatory arbitration clauses were enforceable pursuant to Section 301 of the LMRA. *Id.* at 582-83. Finally, in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court narrowly construed its judicial review power of decisions made by arbitrators pursuant to collectively-bargained arbitration clauses. *Id.* at 596.

B. Permitting the EEOC To Litigate on Behalf of Individuals Who Have Signed Valid Agreements To Arbitrate Undercuts the Very Purposes for Which Arbitration Is Favored

Permitting the EEOC to pursue monetary damages on behalf of individuals who have signed valid agreements to arbitrate their employment claims would countermand this Court's pronouncements in *Circuit City* and *Gilmer* by thwarting the very purpose for which arbitration is used—avoidance of the costs and delays of litigation. Under such a rule, an employee could agree to arbitrate his claims, yet the EEOC would retain the right, notwithstanding his promise to resolve his grievance outside of court, to pursue monetary remedies on his behalf. Thus, while the employee is spared the expense and inconvenience of protracted litigation[6], his employer is not.

Even if the employee did elect to have his complaints resolved in the arbitral forum, under the rule endorsed by the EEOC, the arbiter's ultimate decision would lack the finality that is one of the primary reasons arbitration is valued, since the entire matter would be subject to relitigation.

---

[6] As a practical matter and as amici for the EEOC readily concede, however, the EEOC actually litigates only one-half of one percent of all the discrimination charges it receives. Thus, for all those employees whose cause is not taken up by the EEOC, their *only* alternative, in the absence of an agreement to arbitrate, is to pursue a time-consuming and costly private action in federal court.

III. ALLOWING THE EEOC TO PURSUE VICTIM-SPECIFIC REMEDIES ON BEHALF OF AN EMPLOYEE WHO MAY SEEK SUCH RELIEF IN ARBITRATION WOULD DISCOURAGE EMPLOYERS FROM PARTICIPATING IN ALTERNATIVE MEANS OF DISPUTE RESOLUTION

As noted above, permitting the EEOC to maintain a public enforcement action in which it seeks victim-specific remedies on behalf of an individual who has agreed to arbitrate his claims would substantially discourage employers from offering arbitration to their employees as an alternative means of dispute resolution. Employers and employees who select arbitration as their forum of choice would not be able to rely on the arbitrator's decision in their quest for expeditious, affordable and final resolution of the matter. Instead, certainly the employer, if not the employee, would be required to expend additional time and resources relitigating issues that already had been disposed of in arbitration. Such a result is exactly the type that this Court sought to avoid in *Circuit City*, when it dismissed the notion that arbitration is a sort of "second-class" justice.

The result that the EEOC seeks would destroy much of the incentive employers now have to enter into arbitration agreements. By extension, the logic of the EEOC's position would allow it to circumvent even privately negotiated settlements, an authority even the agency itself does not explicitly claim.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 99-1823

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Nothing in the Federal Arbitration Act (FAA) requires public enforcement agencies such as the EEOC to arbitrate disputes they have not agreed to arbitrate, or to forgo available forms of relief they have not agreed to forgo. Title VII and the Americans with Disabilities Act (ADA) authorize the EEOC to seek the full range of statutory remedies, including damages and other victim-specific relief, in a public enforcement action. The EEOC does not operate as the employee's agent or subrogee in a public enforcement action; the EEOC may choose its preferred forum and bring suit even when the victim does not seek to vindicate his own rights. Allowing the EEOC to obtain all authorized statutory remedies in an enforcement action arising out of events concerning an employee who has signed an arbitration agreement does not conflict with the terms

and policies of the FAA. The EEOC has not agreed to arbitrate any aspect of *its* dispute with the employer. Respondent's argument is based on two premises. Respondent contends (1) that "EEOC is wrong to argue that precluding it from obtaining individual-specific remedies is contrary to Title VII's enforcement provisions," Resp. Br. 18, and (2) that the FAA "compelled the Fourth Circuit's decision," *id.* at 12. Both contentions are mistaken.

I. TITLE VII UNAMBIGUOUSLY GIVES THE EEOC THE RIGHT TO RECOVER VICTIM-SPECIFIC RELIEF

Title VII and the ADA unambiguously give the EEOC the right to obtain the full range of statutory remedies and draw no distinction between victim-specific and broad injunctive relief. Nonetheless, the court of appeals precluded the EEOC from obtaining any victim-specific relief—legal or equitable—whenever the victim had signed an arbitration agreement. Respondent does not directly embrace the Fourth Circuit's reasoning. Instead, respondent argues (Br. 18) that "Title VII authorizes EEOC to secure only 'appropriate' relief," Resp. Br. 8 (citing 42 U.S.C. 2000e-5(g)(1)), and that victim-specific relief is not "appropriate" in an EEOC action if the victim of discrimination (but not the EEOC) has signed an arbitration agreement. *Id.* at 8-9, 18-19. See also Br. of Amicus Council for Employment Equity 8-13. The court of appeals did not rely on this "appropriate relief" argument, and with good reason.

A. The "As May Be Appropriate" Standard On Which Respondent Relies Does Not Govern Legal Relief Under Title VII

The first problem with respondent's appropriate-relief argument is that it does not support the holding below. Title VII and the ADA have two distinct provisions that govern remedies. The first, Section 706(g)(1), on which respondent relies, governs equitable relief. That provision states that

> [i]f the court finds that the [defendant] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [defendant] from engaging in such unlawful employment practice, and order *such affirmative action as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate.

42 U.S.C. 2000e-5(g)(1) (emphasis added). The second, Section 1981a, governs damages. Section 1981a provides that in an action under Title VII,

> the complaining party *may recover* compensatory and punitive damages, as allowed in [42 U.S.C. 1981a(b)], in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. 1981a(a)(1)-(2) (emphasis added).

The "complaining party may recover" formulation of Section 1981a, by its terms, gives the EEOC (which is defined by statute as a "complaining party," see U.S. Br. 18-19) a mandatory right to obtain damages if it can satisfy the ordinary prerequisites for damages. The

standard legal definition of the term "may" is "[i]s permitted to." *Black's Law Dictionary* 993 (7th ed. 1999). Thus, the EEOC "is permitted to" recover whatever damages it can prove in a Title VII or ADA case. As in other circumstances, "[c]ompensatory damages * * * are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss." *Smith* v. *Wade*, 461 U.S. 30, 52 (1983); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, J., concurring) (award of damages "upon proper proof would follow virtually as a matter of course from a finding that an employer had unlawfully discriminated").[1]

By basing its argument on a discretion-conferring provision that applies only to equitable relief, respon-

[1] The formulation "may recover" is used dozens of times throughout the U.S. Code to give a party the legal right to recover damages. Among the examples, with emphasis added in each, are: 7 U.S.C. 2022(c)(3)(ii) ("A State agency *may recover* an uncollected overissuance [of food stamp coupons] * * * by obtaining a writ, order, summons, or other similar process in the nature of garnishment from a court of competent jurisdiction."); 7 U.S.C. 2157(d) ("Any person * * * injured * * * by reason of [an unlawful release of certain confidential information] *may recover* all actual and consequential damages sustained by such person."); 12 U.S.C. 86 (in case of usurious interest, "the person by whom it has been paid, * * * *may recover* back, in an action in the nature of an action of debt, twice the amount of the interest"); 12 U.S.C. 1715z-4a(c) (1994 & Supp. V 1999) (In an action for unauthorized use of multifamily housing project assets or income, "the Attorney General *may recover* double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement."); 28 U.S.C. 2718 ("In suits for balances due the Post Office Department *may recover* interest at the rate of 6 per centum per year from the time of default.").

dent's leaves much of the court of appeals' holding essentially undefended. That holding precluded the EEOC from seeking *any* victim-specific relief, and damages are the classic form of victim-specific relief. Yet, with respect to damages, respondent can point to no textual (or other) basis to dispute the EEOC's clear entitlement to seek damages.[2]

B. Precluding Victim-Specific Equitable Relief Would Contradict Title VII And Therefore Would Not Be "Appropriate"

Respondent asks this Court to interpret Title VII's grant of discretion to fashion equitable relief to limit the EEOC's remedial options. However, this Court's precedents make clear that Congress gave district courts discretion to ensure complete relief, not to frustrate Title VII's objectives. In *Albemarle Paper*, for example, this Court rejected the argument that Section 706(g)(1) grants district courts broad discretion to deny back pay to Title VII plaintiffs. The Court explained that "Congress' purpose in vesting a variety of 'discretionary' powers in the courts was," not to give victims the bare minimum recovery, but "to make possible the fashioning of the most complete relief possible." 422 U.S. at 421 (internal quotation marks and brackets omitted). The Court noted that, although "backpay is not an automatic or mandatory remedy," *id.* at 415, a district court must exercise its discretion "in light of the larger objectives of the Act," *id.* at 416 (citation omitted). Specifically, courts should exercise

[2] Respondent's textual argument actually applies only to a subset of authorized victim-specific equitable relief. The "as may be appropriate" language in Section 706(g)(1) governs only reinstatement, back pay, and "other" equitable relief; it does not apply to injunctions, whether or not they are victim specific.

remedial discretion with an eye to "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. Denying the EEOC statutorily authorized remedies for discrimination on the basis of the victim's arbitration agreement does not serve either of these objectives.

Congress did not grant courts remedial discretion to issue such equitable relief "as may be appropriate" so that courts could restrict Title VII remedies to further the policies of other federal statutes. Instead, Congress provided for broad remedial discretion in order "to allow the most complete achievement of the objectives *of Title VII*." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770-771 (1976) (emphasis added). Consequently, this Court has rejected the argument that other federal policies justify restricting remedies expressly authorized by Title VII. In *Franks* and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974), the Court rejected efforts to limit the remedies in, and availability of, individual actions, despite alleged conflicts with federal policies favoring collective bargaining. In *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 330-332 (1980), the Court upheld the Commission's ability to bring enforcement actions on behalf of groups of employees, despite an alleged conflict with the policies embodied in Rule 23. What this Court said in *General Telephone* applies with equal force here: "We are reluctant, absent clear congressional guidance, to subject § 706(f)(1) actions to requirements that might disable the enforcement agency

from advancing the public interest in the manner and to the extent contemplated by the statute." *Id.* at 331.[3]

Restricting the remedies available to the EEOC in the manner proposed by respondent would clearly undermine the language and broader purposes of Title VII. Congress expressly made the full range of statutory remedies available to the EEOC, both in the 1972 amendments, which enhanced the remedies available in EEOC enforcement actions, and in the 1991 amendments, which made damages available to all complaining parties, including the EEOC. Respondent would reverse the effect of those amendments whenever a victim has signed an arbitration agreement. See U.S. Br. 37-38.

Respondent's proposed rule would produce other anomalous results that would frustrate Title VII's objectives. In the absence of valid arbitration agreements, the EEOC may bring an enforcement action against an employer and seek victim-specific relief, even if the victim does not wish to pursue an individual claim. If the employer requires employees to arbitrate

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[3] Section 706(g)(1)'s authorization for courts to order appropriate relief is designed to give district courts the discretion to grant complete relief "to locate 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper*, 422 U.S. at 424 (quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931)). Accord *Franks*, 424 U.S. at 770-771. That language does not support respondent's proposed *categorical* rule that victim-specific relief is *never* appropriate in EEOC actions involving victims who have agreed to arbitrate. See, *e.g.*, *id.* at 779; *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995) (rejecting "[a]n absolute rule barring any recovery of backpay," whenever there is after-acquired evidence of employee misconduct); cf. *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317 (1994) (rejecting a categorical rule prohibiting NLRB awards of reinstatement and back pay to victims who gave false testimony).

disputes, however, respondent's rule would completely immunize the employer from victim-specific relief whenever the victim does not pursue an individual claim. The rule also could complicate the EEOC's efforts to seek relief on behalf of a broad group of employees only some of whom have signed arbitration agreements. *General Telephone* makes clear that the EEOC has the authority to seek relief for multiple employees, but the court of appeals' rule would force the court to limit the availability of victim-specific relief to employees unencumbered by an arbitration agreement. Respondent's rule also would undermine the congressionally mandated conciliation process. See *pp.* 17-18, *infra.*

Finally, respondent's appropriate-relief argument suffers an additional conceptual flaw. Arbitration agreements generally govern the right to sue in court, and have only an incidental effect on the availability of remedies. When a dispute is subject to arbitration, the whole dispute, not just certain remedies, must be arbitrated. Respondent's arbitration agreement is no different; it categorically precludes the victim from bringing any Title VII claim in federal court. In light of the arbitration agreement's complete elimination of the employee's right to sue in court, it is not at all clear why, in respondent's view, that agreement does not preclude the EEOC's right to sue, but does limit the EEOC's right to seek certain remedies. There is simply no reason why an agreement that, by its terms, limits the parties' access to court, but not available remedies, should manifest itself as a limit on a non-party's available remedies, but not on its access to court.

II. BECAUSE THE EEOC HAS NOT AGREED TO ARBITRATE ITS CLAIMS, THE FEDERAL ARBITRATION ACT DOES NOT LIMIT THE EEOC'S RIGHTS IN LITIGATION

A. The Policies Of The FAA Do Not Support Limiting The EEOC's Available Remedies In A Dispute The EEOC Did Not Agree To Arbitrate

The EEOC's ability to obtain the full range of statutory remedies in a public enforcement action involving a victim who signed an arbitration agreement is entirely consistent with the FAA. Respondent contends that there is a "tension between the FAA and the anti-discrimination statutes" (Br. 14) that must be "harmonized" (Br. 16) by precluding the EEOC from obtaining victim-specific relief authorized by Title VII. If there were any such "tension" between the text of Title VII and the policies of the FAA, its appropriate resolution would be to enforce the text of Title VII and leave Congress the task of amending the statutes to accommodate any policy concerns not currently reflected in the statutory text. There is, however, no such "tension."

The operative provision of the FAA simply provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The FAA, "as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Accordingly, "just as [a party] has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley &*

Sons, Inc. v. *Livingston*, 376 U.S. 543, 547 (1964). See also *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 648 (1986) ("party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (citation omitted). The EEOC has never entered into a private contractual arrangement with respondent. The FAA's "pro-arbitration policy" (Resp. Br. 18), therefore, does not impose any limitation on an EEOC public enforcement action.

Respondent clearly seeks to bind the EEOC through an arbitration agreement to which the EEOC never consented. Absent a binding arbitration agreement between an employer and employee, the employee can sue its employer in court (and seek all available remedies) and the EEOC can bring its own independent enforcement action in court (and seek all available remedies). Respondent insists that by signing an arbitration agreement with its employee, not only does the employee, who is a party to the agreement, give up his right to sue, but a non-party, the EEOC, somehow loses its right to seek certain remedies in its own enforcement action. The policies of the FAA are completely vindicated by honoring the arbitration agreement *between the parties*. But extending that agreement to limit the rights of third parties not only is unnecessary to further the policies of the FAA, but actually undermines those policies, which are based on consent.[4]

[4] Because the arbitration agreement binds the parties, it would preclude the employee from intervening in the EEOC's enforcement action. But see Resp. Br. 29. That preclusion could be significant because the EEOC is bound in a public enforcement action to advance the public interest, rather than the individual employee's interests. See U.S. Br. 29-30.

B. The EEOC Is Not Bound To The Employee's Arbitration Agreement As The Employee's Agent

1. Respondent argues (Br. 32) that its arbitration agreement can bind the EEOC because "a non-party to an arbitration agreement may be compelled to arbitrate in a variety of circumstances." Respondent's authorities, however, do not support its attempt to bind the EEOC to an arbitration agreement the EEOC did not sign.

Respondent's primary authority is *Thomson-CSF, S.A.* v. *American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995). In that case, the court *refused* to require a non-party to submit a dispute to arbitration. The court appropriately relied on the principle that "[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." *Id.* at 779 (citing *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). To be sure, the court did note, in dictum, "that a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency.'" *Id.* at 776 (citation omitted). But the court's discussion of those principles and the situations in which non-parties are bound by arbitration agreements makes clear that there is no precedent for binding the EEOC here. Courts have found non-parties bound by arbitration agreements when the non-party had assumed the duties of, or knowingly accepted the benefits of, the contract containing the arbitration agreement, *id.* at 777-778, or when the non-party was an agent or corporate alter ego of a party to the agreement, *ibid.*

In this case, as in *Thomson-CSF*, there is no basis for holding the non-party (here, the EEOC) to the arbitra-

tion agreement. The EEOC has not assumed the contractual obligations of the victim of discrimination or accepted the benefits of the victim's employment contract. The EEOC is not an agent of the victim, because the victim in no way exercises control over the EEOC —the first prerequisite of an agency relationship. See Restatement (Second) Agency §§ 1, 14 (1958). And, obviously, there is no corporate veil-piercing issue involved in this case.

2. An additional problem with respondent's effort to bind the EEOC to the arbitration agreement as the employee's agent is that respondent seeks to avoid the logical implications of its argument. Assuming it is binding, the arbitration agreement between respondent and Mr. Baker prevents Baker from bringing any court action alleging any ADA violation, whether it seeks relief equitable or legal, broad or narrow. If (contrary to fact) the EEOC were bound by the agreement as Baker's agent, the EEOC likewise could not bring any ADA action, without regard to the relief sought. In light of the EEOC's statutory right to bring public enforcement actions and the Fourth Circuit's holding, respondent does not advance that position. However, the compromise position to which respondent retreats —that the EEOC is barred only from obtaining some (*i.e.*, victim-specific) relief—has no grounding in either respondent's arbitration agreement, which limits the parties' right to sue, not remedies, or the policies of the FAA.[5]

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[5] Moreover, the compromise position that respondent and the Fourth Circuit embrace is a result Congress clearly rejected in the 1972 amendments giving the EEOC the right to obtain individual, victim-specific relief even in non-"pattern or practice" cases. See U.S. Br. 28-29, 35-36.

C. Respondent Cannot Restrict The EEOC's Enforcement Authority On The Theory That The EEOC Is The Employee's Subrogee Or Based On Principles Of Res Judicata

1. More generally, binding the EEOC through the victim's arbitration agreement conflicts with Congress' decision to give the EEOC its own independent enforcement action. Respondent attempts to portray the EEOC as a mere subrogee that "stands in the shoes" of the individual victim of discrimination. See Resp. Br. 10, 30-32. The EEOC, however, is a public enforcement agency that does not merely stand in the shoes of victims of discrimination. Title VII and the ADA give the EEOC an independent cause of action that is in critical respects superior to an individual's claim and that the EEOC can pursue even against the victim's wishes. That public enforcement action is not something the employee can bargain away in an arbitration agreement with his employer.

Congress structured Title VII so that the EEOC's right to bring suit and obtain relief is independent of the private victim. See U.S. Br. 20-21. Under the terms of Title VII, the EEOC may bring suit and obtain all forms of relief authorized by statute without naming the victim as a party and regardless of whether the victim intervenes. Indeed, respondent does not dispute that the EEOC may bring suit and obtain relief, even if the individuals for whom it seeks relief disavow the suit and claim not to want relief. See *ibid.* (citing cases). Congress could have denied the EEOC any right to bring public enforcement actions without the employee's consent or limited the EEOC to seeking "broad equitable relief" in such cases, but it did neither. As with the Fair Labor Standards Act, "the purposes of

[Title VII] require that it be applied even to those who would decline its protections." *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 302 (1985).

In addition, the antidiscrimination laws give the EEOC particular control over the early phases of the enforcement process. To facilitate investigation and conciliation, the EEOC has the exclusive right to litigate for a period after the filing of a complaint. See 42 U.S.C. 2000e-5(f)(1). If the EEOC decides to bring an enforcement action, the victim has no control over the EEOC's choice of forum and no right to bring an action in another forum. See U.S. Br. 21-22. It would be particularly inappropriate to allow an arbitration agreement to trump the EEOC's statutory rights over the forum, when such an agreement "is, in effect, a specialized kind of forum-selection clause." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). In sum, Title VII gives the EEOC a public enforcement action to remedy the public wrong of discrimination that does not simply mirror the private cause of action given the victim. Accordingly, the victim's decision to arbitrate its private action does not bind the EEOC in pursuing its public enforcement action.

2. Respondent also tries to minimize the peculiarity of binding the EEOC to the terms of an arbitration agreement it did not sign by emphasizing that "[t]here are recognized circumstances under which an individual's conduct limits" the amount of damages in an EEOC enforcement action. Resp. Br. 29. But those "recognized circumstances" do not support extending respondent's arbitration agreement to limit the EEOC's remedies. There are specific rules, discussed above, for deciding whether a non-party is bound by an arbitration agreement, and those rules provide no basis

for holding the EEOC to the terms of respondent's agreement.

The fact that Title VII incorporates well-established principles of the law of damages does not alter that conclusion. Arbitration agreements generally incorporate, rather than alter, the substantive law of damages. Accordingly, the principles respondent cites, such as the rule that the victim must mitigate damages, see 42 U.S.C. 2000e-5(g), apply whether an action is litigated or arbitrated. Respondent's proposed rule, by contrast, would make a victim's agreement to arbitrate, which generally does not affect his remedies in arbitration, limit the remedies available to the EEOC in court. That makes no sense. Indeed, it only reinforces the problems with respondent's efforts to take an arbitration agreement, which governs the parties' ability to sue in court, and turn it into a limitation on the remedies available to a non-party.

3. Respondent also relies (Br. 30-31) on a line of cases that have held that a settlement or judgment in a private suit or arbitration proceeding between employee and employer may limit the EEOC's remedies in a subsequent public enforcement action. Here, there is no prior private judgment or settlement, and respondent's cases are accordingly inapposite. See U.S. Br. 38-39 n.13.

Respondent's cases rely primarily on principles of res judicata to hold the outcome of private litigation or arbitration preclusive of the EEOC's remedies. See U.S. Br. 38-39 n.13. Res judicata principles, however, involve considerations not pertinent in the absence of prior litigation. As then-Justice Rehnquist explained, "the judiciary retains an independent interest in preventing the misallocation of judicial resources and second-guessing prior panels of Art. III judges when

the issue has been fully and fairly litigated in a prior proceeding." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 433 (1980) (Rehnquist, J., dissenting).[6] Congress recognized that independent interest of the judiciary by structuring the Title VII enforcement scheme to avoid duplicative litigation; an employee may not bring his own suit once the EEOC has commenced litigation.[7]

The interest in avoiding duplicative litigation does not apply where the employee has taken no action to arbitrate or litigate his claim. The Court recognized a similar distinction in *General Telephone* when it reaffirmed the EEOC's right to bring an enforcement action on behalf of employees generally when they have not sued separately, but cautioned that "courts can and should preclude double recovery by an individual." 446 U.S. at 333. Far from avoiding duplicative litigation, respondent's rule would virtually require it by forcing the private individual to seek victim-specific relief in arbitration while the EEOC seeks broader relief in court. See U.S. Br. 39-40. In any event, petitioner's res

[6] See also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (noting that res judicata's role in preserving judicial resources means that "trial courts may in appropriate cases raise the res judicata bar on their own"); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979) ("[Res judicata] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.").

[7] Moreover, in many of respondent's cases, the individual signed a settlement agreement specifically extinguishing his right to additional relief. In that situation, allowing the EEOC to recover relief on behalf of the victim would conflict with that agreement. But there is no such conflict here. An arbitration agreement addresses the distinct issue of the right to sue in court, but does not extinguish the right to individual relief.

judicata cases are beside the point. As discussed above, there are specific rules that govern who is bound by an obligation to arbitrate. Those rules are distinct from res judicata principles and make clear that the EEOC is not bound by respondent's agreement.

D. Allowing The EEOC To Pursue All Statutory Remedies Promotes Conciliation And Respects Employers' Legitimate Expectations

Respondent argues (Br. 21) that the antidiscrimination laws "expressly encourage[] the use of arbitration," relying on Congress's statement of policy that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes" under the antidiscrimination laws. 42 U.S.C. 1981 note; 42 U.S.C. 12212. But this provision, like the FAA, encourages arbitration only when the parties have consented to arbitration. It does not encourage forcing the EEOC to arbitrate or forgo remedies absent such consent.

Moreover, respondent's rule would undermine "conciliation"—the form of alternative dispute resolution Congress required in cases brought by the EEOC. Congress requires the EEOC to endeavor to eliminate unlawful employment practices "*by informal methods of conference, conciliation, and persuasion.*" 42 U.S.C. 2000e-5(b) (emphasis added). Indeed, the EEOC may not bring an enforcement action unless it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." 42 U.S.C. 2000e-5(f)(1). The threat of an EEOC enforcement action generally gives employers a strong incentive to resolve disputes in the EEOC's conciliation process. By

severely restricting the remedies available to the EEOC in court, respondent's rule would dull employers' incentives to engage in meaningful conciliation.

Finally, permitting the EEOC to use all available remedies could have only a *de minimis* impact on arbitration and legitimate employer expectations. Respondent agrees that, as a practical matter, the EEOC's litigation represents only a tiny fraction of all employment discrimination litigation. Compare U.S. Br. 26 & n.9 with Resp. Br. 35 ("EEOC is an almost non-existent player in enforcement litigation."). Accordingly, permitting the EEOC to obtain all statutorily authorized forms of relief in cases it does bring could have at most only a *de minimis* impact on the expectations of employers and the policies of the FAA.

Precluding the EEOC from obtaining full relief, however, would have a negative effect on the much larger number of cases that go through the conciliation process and would have a substantial impact on the EEOC's limited litigation program. The EEOC carefully selects the small number of cases it litigates, based on the public interest in those cases. If the EEOC is barred from seeking victim-specific relief in even a few cases, it could have a substantial negative impact on the deterrent effect of the EEOC's very modest overall litigation program. Cf. *Albemarle Paper*, 422 U.S. at 417 ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."); see also U.S. Br. 37.

Moreover, in situations like this in which an employer requires all prospective employees to sign arbitration agreements, legal issues concerning victim-specific aspects of the employer's conduct, such as whether a practice justifies an award of back pay or punitive

damages, will be completely shielded from judicial inquiry. See U.S. Br. 36-37 & n.12. Respondent's rule thus could preclude judicial development of certain important issues, despite this Court's observation that "judicial construction has proved especially necessary with respect to Title VII." *Alexander*, 415 U.S. at 57; see also *McKennon*, 513 U.S. at 358-359. On the other hand, respecting employees' agreements to arbitrate, but allowing the EEOC to act as a safety valve that ensures the possibility of a judicial hearing on all issues in the most critical cases respects employers' legitimate expectations while permitting the full vindication of Title VII and the ADA.

* * * * *

For the reasons given above, as well as those in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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